No. 96-1578



In The

# Supreme Court of the United States

October Term, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALES, HON. NATHAN L. HECHT, HON. JOHN CORNYN, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, HON. PRISCILLA OWEN, HON. JAMES A. BAKER, HON. GREG ABBOTT, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE TEXAS SUPREME COURT; TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

v. *Petitioners,*

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## JOINT APPENDIX

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**Petition For Certiorari Filed April 4, 1997**
**Certiorari Granted June 27, 1997**

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## INDEX TO JOINT APPENDIX

## RELEVANT DOCKET ENTRIES

| | |
|---|---|
| 2/7/94 | Complaint filed in United States District Court for the Western District of Texas |
| 9/24/94 | Supreme Court Defendants' Motion to Dismiss denied |
| 10/19/94 | Texas Equal Access to Justice Foundation Defendants' Motion to Dismiss denied |
| 1/19/95 | Opinion and Judgment of District Court |
| 2/10/95 | Notice of Appeal filed by Plaintiffs |
| 9/12/96 | Opinion and Judgment of Fifth Circuit |
| 9/26/96 | Suggestion for Rehearing *En Banc* and Petition for Panel Rehearing filed by Appellees |
| 2/14/97 | Suggestion for Rehearing *En Banc* and Petition for Panel Rehearing denied |
| 4/4/97 | Petition for a Writ of Certiorari filed |
| 5/5/97 | Cross-Petition for a Writ of Certiorari filed |
| 6/27/97 | Petition granted limiting question presented to Question One |
| 6/27/97 | Cross-Petition for a Writ of Certiorari denied |

**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**WASHINGTON LEGAL FOUNDATION,**
2009 Massachusetts Ave., NW
Washington, DC 20036

**MICHAEL J. MAZZONE,**
2927 Georgetown
Houston, TX 77005

and

**WILLIAM R. SUMMERS,**

Plaintiffs,

v.

**TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,**
400 West 15th St., Suite 712
Austin, TX 78701

**W. FRANK NEWTON,**
Chairman,
Texas Equal Access to Justice Foundation,
400 West 15th St., Suite 712
Austin, TX 78701

**THOMAS R. PHILLIPS,** Chief Justice,
Supreme Court of Texas,
201 W. 14th Street
Austin, TX 78701

Civil Action No.
**A 94 CA 081 JN**

(Filed
Feb. 7, 1994)



**RAUL A. GONZALEZ,** Justice,
Supreme Court of Texas,
201 W. 14th Street
Austin, TX 78701

**JACK HIGHTOWER,** Justice,
Supreme Court of Texas,
201 W. 14th Street
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**NATHAN L. HECHT,** Justice,
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**BOB GAMMAGE,** Justice,
Supreme Court of Texas,
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Austin, TX 78701

**CRAIG T. ENOCH,** Justice,
Supreme Court of Texas,
201 W. 14th Street
Austin, TX 78701

and

**ROSE SPECTOR,** Justice,
Supreme Court of Texas,
201 W. 14th Street
Austin, TX 78701

Defendants.

## COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action brought by a public interest law firm, an attorney licensed to practice law in the State of Texas, and a citizen of Texas to enjoin state officials from continuing to enforce Texas's IOLTA ("Interest on Lawyers' Trust Accounts") program.

2. Under the IOLTA program, Texas officials compel attorneys under certain circumstances to forward interest earned on funds being held by the attorneys for their clients, to a state-controlled entity.

3. Each of the Plaintiffs objects to this compelled taking and use of IOLTA trust accounts, in violation of their rights under the U.S. Constitution as guaranteed by the First and Fifth Amendments.

### Jurisdiction

4. The Court has jurisdiction over this action under 28 U.S.C. § 1331, in that the action arises under the Constitution of the United States; and under 28 U.S.C. § 1343, in that the action seeks redress of the deprivation, under color of state law, of rights secured by the Constitution. Plaintiffs' right to judicial review of the actions complained of is secured by 42 U.S.C. § 1983.



### Parties

5. Plaintiff WASHINGTON LEGAL FOUNDATION is a nonprofit public interest law and policy center based in Washington, DC with more than 100,000 members and supporters nationwide, including many within Texas. It devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference. Among WLF's members are citizens of Texas who object to having their money used to support the Texas IOLTA program, and attorneys in Texas who object to being forced to place client trust funds into IOLTA accounts.

6. Plaintiff MICHAEL J. MAZZONE is a citizen of Texas and an attorney licensed to practice law in Texas. He is suing on behalf of himself and in his fiduciary capacity as trustee on behalf of his clients who have funds in his IOLTA trust account.

7. Plaintiff WILLIAM R. SUMMERS is a citizen of Texas. In the course of his business dealings, he has in the past engaged the services of attorneys and expects to continue to do so. SUMMERS has had his money placed into IOLTA trust accounts. Currently, a small amount of his money is in an IOLTA account and has been in that account since May 1993.

8. Defendant TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION is a nonprofit corporation established under the direction of the Supreme Court of Texas. Pursuant to rules established by the Supreme Court of Texas, all interest earned on IOLTA accounts is forwarded to the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, which in turns distributes the funds to other entities in

accordance with rules established by the Texas Supreme Court.

9. Defendant W. FRANK NEWTON is Chairman of the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION. NEWTON is being sued in his official capacity.

10. Defendant THOMAS R. PHILLIPS is Chief Justice of the Supreme Court of Texas, the government body at whose direction the Texas IOLTA program was established. PHILLIPS is being sued in his official capacity.

11. Defendant RAUL A. GONZALEZ is a Justice of the Supreme Court of Texas. GONZALEZ is being sued in his official capacity.

12. Defendant JACK HIGHTOWER is a Justice of the Supreme Court of Texas. HIGHTOWER is being sued in his official capacity.

13. Defendant NATHAN L. HECHT is a Justice of the Supreme Court of Texas. HECHT is being sued in his official capacity.

14. Defendant LLOYD DOGGETT is a Justice of the Supreme Court of Texas. DOGGETT is being sued in his official capacity.

15. Defendant JOHN CORNYN is a Justice of the Supreme Court of Texas. CORNYN is being sued in his official capacity.

16. Defendant BOB GAMMAGE is a Justice of the Supreme Court of Texas. GAMMAGE is being sued in his official capacity.



17. Defendant CRAIG T. ENOCH is a Justice of the Supreme Court of Texas. ENOCH is being sued in his official capacity.

18. Defendant ROSE SPECTOR is a Justice of the Supreme Court of Texas. SPECTOR is being sued in her official capacity.

**Statement of the Claim**

19. By order effective May 9, 1984, the Supreme Court of Texas amended the State Bar Rules in order to create the Texas Equal Access to Justice Program (the "IOLTA Program"). The amendments, codified as Article XI of the State Bar Rules, provided that an attorney receiving client funds that were "nominal in amount" or were "reasonably anticipated to be held for a short period of time" was permitted to place the funds into an unsegregated interest-bearing bank account (an "IOLTA account") and to pay interest earned on those funds to a nonprofit corporation to be established by rules to be promulgated by the Supreme Court of Texas.

20. Article XI further provided that the nonprofit corporation was to be governed by a board of directors consisting of a chairman and twelve members. The chairman and six directors were to be appointed by the Supreme Court of Texas and the other six directors were to be appointed by the president of the State Bar of Texas.

21. In order to implement Article XI, the Supreme Court of Texas by order dated April 30, 1984 adopted its "Rules Governing the Operation of the Texas Equal

Access to Justice Program" (the "Rules"). The Rules provided, *inter alia*, that the nonprofit corporation whose creation was mandated by Article XI was to be the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION.

22. Consistent with Article XI, the Rules specified that funds forwarded to the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION from IOLTA accounts were to be awarded as grants solely to nonprofit organizations that "have as a primary purpose the delivery of legal services to low income persons." The Rules specified certain uses to which such grant money could not be put, including class action suits and lobbying for or against any candidate or issue.

23. During the first four years of operation of the IOLTA program (1985-1988), funds forwarded from IOLTA accounts to the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION never exceeded $1 million per year.

24. On November 11, 1988, the Board of Trustees of the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION voted unanimously to recommend to the Supreme Court of Texas conversion from a voluntary to a mandatory IOLTA program in Texas.

25. On December 13, 1988, the Supreme Court of Texas amended Article XI and the Rules in order to make participation in the Texas IOLTA program mandatory. Pursuant to the amended Article XI and the amended Rules, attorneys in Texas who "hold client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" *must* place the funds in an unsegregated interest bearing account, with interest earned thereon to be paid to the TEXAS EQUAL ACCESS



TO JUSTICE FOUNDATION. Attorneys and their clients are not permitted to place such funds into a non-interest-bearing account. Copies of the most recent versions of Article XI and the Rules are attached hereto as Exhibits A and B, respectively.

26. The amendments to Article XI and the Rules were adopted without following the state-law procedures for amending rules governing the State Bar, set forth in the State Bar Act, Vernon's Tex. Stat. Ann. Government Code § 81.024. Those procedures include a requirement that no amendment is valid unless approved by a vote of at least 51% of the registered members of the State Bar.

27. All attorneys licensed by the Texas Supreme Court to practice law in Texas annually must provide evidence to the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION that they are in compliance with the requirements of Article XI and the Rules. Rule 24.

28. The switch from a voluntary to a mandatory IOLTA program became effective as of July 1, 1989. As a result of that switch, interest income generated by the Texas IOLTA program has increased ten-fold – to as much as $10 million per year in recent years.

29. Many of the organizations to which the TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION provides grant funds (hereinafter, the "Recipient Organizations") use those funds to support litigation and other causes to which some citizens of Texas object for political or ideological reasons. As just one example, the Lawyers Committee for Civil Rights – an organization that has long advocated various "liberal" causes such as expansion of anti-discrimination rights of action – has been a regular

recipient of TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION grant funds. The Lawyers Committee for Civil Rights has used such funds to litigate for, *inter alia*, the expansion of rights of undocumented aliens. Some citizens of Texas, including some members of WLF, oppose the expansion of legal rights for such individuals and thus object to such litigation on political and/or ideological grounds. As another example, some of the Recipient Organizations have engaged in litigation over the drawing of electoral districts. Some citizens of Texas, including some members of WLF, object on political and/or ideological grounds to any such litigation, believing that decisions regarding electoral districts ought to be made by the executive and legislative branches of government.

30. In accordance with Article XI and the Rules, Plaintiff MAZZONE maintains an IOLTA account into which he regularly places client trust funds that either are nominal in amount or are reasonably anticipated to be held for a short period of time. Plaintiff MAZZONE has determined from experience that as a practical matter he cannot operate his law practice without collecting client funds that either are nominal in amount or are reasonably anticipated to be held for a short period of time, and that he cannot practicably set up a separate interest-bearing account for each such client. Accordingly, he has no choice but to place such funds into his IOLTA account.

31. Plaintiff MAZZONE holds title to such funds as trustee for the clients who have given him the funds for their own benefit. As trustee of the clients' funds, he is in a fiduciary relationship with his clients. His fiduciary duties to his clients include a duty to act solely in the interest of and on behalf of his clients as to matters



relating to the administration of the clients' trusts and as to matters relating to the proper representation of the interests of his clients.

32. Each of Plaintiff MAZZONE's clients whose funds he places in his IOLTA account has a beneficial interest in such funds, which interest includes (but is not limited to) the right to determine who, if anyone, should benefit from any income generated by the funds and the right to determine whether trust funds should generate any income at all. Each client's beneficial interest in an IOLTA account is itself an interest in property.

33. Plaintiff MAZZONE objects to some of the uses to which Recipient Organizations are putting IOLTA grant money and thus objects to being forced to associate with the Recipient Organizations by depositing client trust funds into his IOLTA account. Plaintiff MAZZONE further believes that he is being prevented from fully carrying out his fiduciary responsibilities to his clients by not being permitted to give his clients the option of designating that their trust funds not be placed into his IOLTA account.

34. Plaintiff SUMMERS is a businessman whose work requires him to make regular use of the services of attorneys. In the course of his dealings with attorneys, he has been required to place in trust with the attorneys funds that are nominal in amount or that are reasonably anticipated to be held for a short period of time, and he expects that he will be required to do so again in the future.

35. In May 1993, Plaintiff SUMMERS was sued in connection with one of his business ventures and retained

an attorney to represent him in connection with that litigation. In order to retain his attorney, he was required to make a small retainer payment to the attorney. The litigation is on-going, and his attorney continues to hold the retainer. Plaintiff SUMMERS recently learned that his retainer is being held in an IOLTA account and thus is generating interest to support the IOLTA program.

36. Plaintiff SUMMERS objected to his attorney that he did not wish his retainer to be held in an IOLTA account, because he did not wish to support the Texas IOLTA program. However, his attorney informed him that the attorney had no choice under Article XI and the Rules but to hold the retainer in the IOLTA account, because it was the attorney's good-faith belief that the retainer was "nominal in amount" and would not generate sufficient interest if maintained in a separate account to cover the costs of maintaining such an account.

37. Plaintiff SUMMERS objects to some of the uses to which Recipient Organizations are putting IOLTA grant funds and thus objects to being forced to associate with the Recipient Organizations by having the income generated from his funds used to finance the Recipient Organizations.

38. Any interest income derived from Plaintiff SUMMERS's funds rightfully belongs to him. He objects to anyone other than himself receiving the interest derived from those funds.

39. Plaintiff WASHINGTON LEGAL FOUNDATION (WLF) is a membership organization whose members include Texas citizens who, like Plaintiff SUMMERS, have had and/or are likely in the future to have funds placed



into IOLTA accounts. Those members do not wish to be associated in that manner with Recipient Organizations and do not wish interest on their funds to go to anyone but themselves. Other WLF members include Texas attorneys, like Plaintiff MAZZONE, who find that in order to maintain their law practices they must place funds into IOLTA accounts but who object to being forced in that manner to associate with the Recipient Organizations, and who believe that they are being prevented from carrying out their fiduciary duties to their clients by not being permitted to give their clients the option of placing into non-interest-bearing accounts funds that are nominal in amount or are reasonably anticipated to be held for a short period of time.

40. On January 16, 1992, WLF filed a petition with the Board of Directors of the State Bar of Texas that, *inter alia*, asked the Board of Directors to recommend to the Supreme Court of Texas that the Texas IOLTA program be changed such that no client funds would be placed into an IOLTA account until after the client's informed consent had been obtained. WLF forwarded a copy of that petition to the Supreme Court of Texas. WLF received a July 23, 1993 letter (attached hereto as Exhibit C) from the State Bar's Texas Disciplinary Rules of Professional Conduct Committee, informing WLF that "the Committee determined, after discussion, to take no action" on the petition.

41. Defendant TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION is empowered under the Rules to notify the State Bar of Texas of the names of Texas attorneys who are not in full compliance with IOLTA program requirements as established by Article XI and the Rules.

Rule 24. The State Bar of Texas then notifies the attorneys so named, and attorneys who fail to come into compliance within 30 days of such notice are liable for immediate suspension of their license to practice law by the Supreme Court of Texas.

## COUNT I
**(First Amendment)**

42. Plaintiffs incorporate herein by reference the allegations of Paragraphs 1 through 41.

43. The forced collection and use, under color of state law, of interest generated from funds belonging to Plaintiff SUMMERS and/or belonging to similarly-situated members of Plaintiff WLF, despite their objections to some of the uses to which that interest is put, deprives Plaintiff SUMMERS and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution.

44. The forced collection and use, under color of state law, or [sic] interest generated from trust funds being held in Plaintiff MAZZONE's IOLTA account and/or being held in the IOLTA accounts of similarly-situated members of WLF, despite their objections to some of the uses to which that interest is being put, deprives Plaintiff MAZZONE and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution.



## COUNT II
**(Fifth Amendment)**

45. Plaintiffs incorporate herein by reference the allegations of Paragraphs 1 through 41.

46. The Fifth Amendment to the U.S. Constitution guarantees that private property shall not be taken for public use, without just compensation. The taking, under color of state law, of the interest earned on Plaintiff SUMMERS's funds placed into IOLTA accounts and on the funds of similarly-situated members of WLF placed into IOLTA accounts, constitutes an illegal taking of property belonging to them, in violation of the Fifth Amendment to the U.S. Constitution.

47. The taking, under color of state law, of the interest earned on funds placed into Plaintiff MAZZONE's IOLTA account and on funds placed into the IOLTA accounts of similarly-situated WLF members, constitutes an illegal taking of the property of the clients of Plaintiff MAZZONE and of similarly-situated WLF members, in violation of the Fifth Amendment to the U.S. Constitution.

## COUNT III
**(Fifth Amendment)**

48. Plaintiffs hereby incorporate by reference the allegations of Paragraphs 1 through 41.

49. Defendants' taking of the equitable or beneficial interest in (use of) client funds, under color of state law, by requiring their placement into IOLTA accounts, constitutes an illegal taking of the beneficial use of those funds,

in violation of the Fifth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs respectfully request the following relief:

(1) Enter judgment requiring Defendants TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION and NEWTON to refund the full amount of interest earned on Plaintiffs' money placed into IOLTA trust accounts, plus interest.

(2) Enter judgment declaring Article XI of the State Bar Rules and the Rules Governing the Operation of the Texas Equal Access to Justice Program void as an unconstitutional deprivation of Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, insofar as they *require* attorneys to place certain client funds into IOLTA trust accounts.

(3) Permanently enjoin Defendants TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION and NEWTON from compiling a list of attorneys who fail to comply with the requirements of Article XI and the Rules, and from transmitting any such list to the State Bar of Texas.

(4) Permanently enjoin Defendants members of the Supreme Court of Texas from:

> (a) adopting any rules that purport to require attorneys, as a condition for practicing law in Texas, to handle client trust funds in a manner designed to ensure that interest on those funds will accrue to anyone not designated by the client;



> (b) taking disciplinary action against any attorney for failing to place client trust funds into an IOLTA account.

(5) Award Plaintiffs the costs of this action, including attorney fees as provided for by 42 U.S.C. § 1988.

(6) Award such other relief as the Court may deem just.

Respectfully submitted,

/s/ Steven W. Smith
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Counsel for Plaintiffs Summers and WLF

Dated: February 8, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, MICHAEL J. MAZZONE, and WILLIAM R. SUMMERS | § | |
| VS. | § | CIVIL NO. A-94-CA-081 JN |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL A. GONZALEZ, JACK HIGHTOWER, NATHAN L. HECHT, LLOYD DOGGETT, JOHN CORNYN, BOB GAMMAGE, CRAIG T. ENOCH and ROSE SPECTOR. | § | |

ORDER

Before the Court is the Motion to Dismiss filed by Defendants Thomas Phillips, Raul Gonzalez, Jack Hightower, Nathan Hecht, Lloyd Doggett, John Cornyn, Bob Gammage, Craig Enoch, and Rose Spector ("the Supreme Court Defendants"), the Plaintiffs' Response, and the Supreme Court Defendants' Reply to Plaintiffs' Response. Having reviewed these pleadings as well as the relevant law, the Court finds that the Supreme Court Defendants' Motion to Dismiss this action on the basis of the Plaintiffs' lack of standing should be DENIED.[1]

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[1] This Order expresses no opinion as to the merits of the Motion to Dismiss filed by the Texas Equal Access to Justice Foundation and W. Frank Newton, in which the Defendants move to dismiss this action on the grounds that the Plaintiffs have failed to state a claim upon which relief can be granted.



The Plaintiffs in this action are the Washington Legal Foundation, a self-described non-profit public interest law and policy center, Michael Mazzone, a Texas resident and attorney licensed to practice by the Texas Bar, and William Summers, a Texas resident and consumer of legal services rendered by members of the Texas Bar. The Plaintiffs have filed this action claiming that the Texas IOLTA ("Interest on Lawyers' Trust Accounts") Program violates their rights under the First and Fifth Amendments of the United States Constitution. In addition to a declaratory judgment finding the IOLTA Program unconstitutional, the Plaintiffs seek injunctive relief prohibiting mandatory participation in the IOLTA Program, a return of the full amount of interest earned on Plaintiffs' money placed in IOLTA trust accounts, and an award of costs and attorneys' fees.

TEXAS' IOLTA PROGRAM

Article XI of the Rules of the State Bar of Texas establish the Texas Equal Access to Justice Program ("the IOLTA Program"). Under this program, an attorney receiving client funds that are "nominal in amount" or "reasonably anticipated to be held for a short period of time" is required to place the funds in an unsegregated interest-bearing bank account. *See* State Bar Rules Governing Operation of Equal Access to Justice Program Rule 6 (*reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G

app. (Vernon 1988)). More specifically, the only funds eligible for the IOLTA Program are those which

> could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client. *Id.*

Interest earned from IOLTA accounts is to be paid to the Texas Equal Access to Justice Foundation, a non-profit corporation. *Id.* Rule 9. The Foundation is charged with administering these funds, awarding them as grants to non-profit organizations that have a primary purpose of delivering legal services to low income persons. *Id.* Rules 10-12. Originally, the Texas IOLTA program was voluntary. However, in 1988, the Texas Supreme Court entered an order amending the State Bar Rules and converting the voluntary IOLTA program into the mandatory program presently in operation. *Id.*

ARTICLE III STANDING

The Plaintiffs raise two constitutional claims. First, they allege that the IOLTA Program effects a taking of the interest generated by the IOLTA-eligible funds, in violation of the Fifth Amendment. Second, they allege that the use of the interest proceeds to fund certain organizations violates their rights of freedom of association under the First Amendment. The Supreme Court Defendants have moved for dismissal of the Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1), alleging a lack of subject matter



jurisdiction due to the Plaintiffs' lack of standing to bring this action.

As a threshold matter in every federal case, the Court must determine whether the Plaintiffs have standing under Article III of the Constitution to bring their action. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331 (1986). Article III limits the federal judiciary's decisional authority to "cases" and "controversies." *Sierra Club v. Babbitt*, 995 F.2d 571, 574 (5th Cir. 1993). "A case or controversy does not exist unless the person who asks the court for a decision has 'standing' to do so, the elements of which are injury, causation, and redressability." *Id.* (*citing Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992)). Regarding the first element, a plaintiff must "clearly demonstrate that he has suffered an 'injury in fact[ ]' " which means an "injury to himself that is 'distinct and palpable,' . . . as opposed to merely '(a)bstract,' . . . and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.' *Whitmore v. Arkansas*, 495 U.S. 149, 155 110 S.Ct. 1717, 1723 (1990) (*citations omitted*). Second, the claimant must allege facts which show "that the injury 'fairly can be traced to the challenged action.' " *Id.* (*citations omitted*). Third, the plaintiff must show that the injury may be redressed by a favorable decision of the court granting the relief sought. *Id.*; *Defenders of Wildlife*, ___ U.S. at ___, 112 S.Ct. at 2136. The Plaintiffs bear the burden of establishing each of these elements. *Defenders of Wildlife*, ___ U.S. at ___, 112 S.Ct. at 2136; *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608 (1990).

"(A)t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he

personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752 (1982) (*citing Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607 (1979). It is also elementary that a plaintiff cannot assert the rights or interests of third parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975).

For purposes of ruling on the motion to dismiss, the Court must accept as true all material allegations contained in the Plaintiffs' complaint, and must construe the complaint in favor of the complaining party. *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206 (1975); *Cramer v. Skinner*, 931 F.2d 1020, 1025 (5th Cir.), *cert. denied* ___ U.S. ___, 112 S.Ct. 298 (1991). However, on motions to dismiss, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) *cert. denied* 459 U.S. 1105, 103 S.Ct. 729 (1983).

As the Plaintiffs have correctly noted, because an adjudication of the question of standing is not an adjudication on the merits, the Court must assume that the conduct which the Plaintiffs complain of is unconstitutional. *Cramer*, 931 F.2d at 1025 (*citing Warth*, 422 U.S. at 502, 95 S.Ct. at 2207). However, the Plaintiffs must nevertheless "allege and show that they personally have been injured. . . . Unless these (plaintiffs) can . . . demonstrate the requisite controversy between themselves personally and the respondents, 'none may seek relief on behalf of himself or any other member of the class.' "



*Warth*, 422 U.S. at 502, 95 S.Ct. at 2207. The Court's task then is to determine whether each of the Plaintiff's have standing to bring this cause of action in light of the aforementioned considerations.

Standing of Plaintiff Mazzone

Plaintiff Mazzone is an attorney who practices in the State of Texas. Mazzone maintains that as a Texas attorney who is bound by the Texas mandatory IOLTA program, he is being forced to associate with the organizations that receive grants from TEAJF. Some of these recipient organizations offend Plaintiff Mazzone's political and ideological beliefs.[2] Plaintiff Mazzone further maintains that he is being prevented from fully carrying out his fiduciary duties to his clients by not being able to give them the option of designating that their trust funds not be placed into his IOLTA account. Plaintiff Mazzone claims that his First Amendment rights are violated by the mandatory IOLTA program in that he is being forced to associate with organizations that are contrary to his political and ideological beliefs. Finally, Mazzone claims that his clients' rights under the Fifth Amendment are being infringed, and that, as the trustee

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[2] As examples, Mazzone and the other Plaintiffs state that a portion of IOLTA grant funds go to the Lawyers Committee for Civil Rights, an organization the Plaintiffs claim have advocated various "liberal" causes such as the expansion of anti-discrimination causes of action, and the expansion of rights for undocumented aliens. The Plaintiff [sic] also allege that IOLTA funds have been directed to organizations involved in litigation relating to the drawing of boundaries of electoral districts.

of his clients' funds, he is entitled to represent them in this action.

The Court finds that Plaintiff Mazzone has adequately alleged injury sufficient to confer standing and to vest the Court with jurisdiction. Mazzone alleges that State Bar rules compel him to participate in the IOLTA program, and therefore he is forced to associate with IOLTA-funded organizations which offend his political and ideological beliefs. Further, Mazzone states that the mandatory nature of the IOLTA program forces him to choose between acting contrary to his political and ideological beliefs or violating Article XI of the State Bar Rules, thereby risking disciplinary sanctions or possibly disbarment. Without addressing the merits of Mazzone's claims, the Court finds that Mazzone has alleged an injury, namely an impingement upon his First Amendment rights, which may be remedied by the requested relief, namely declaratory and injunctive remedies.[3] Hence, Mazzone's allegations are sufficient to provide him with standing to raise his First Amendment claims.[4]

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[3] Mazzone's claim that he has standing to bring claims on behalf of his clients is somewhat more troubling. It is well-settled that, generally, a plaintiff must assert its own legal rights, without resting its claim for relief on the rights or interests of third parties. *See, e.g., Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205. However, since the Court finds *infra* that Plaintiff Summers (Mazzone's client) has standing to sue in his own right, this issue need not be addressed.

[4] The Supreme Court Defendants argue that since the First Circuit has determined that the Massachusetts IOLTA program does not burden protected speech and is not forced association in violation of the First Amendment, Mazzone lacks standing "as a matter of law." *See Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993). The Supreme Court Defendants have confused standing questions with defenses on the merits. While the First Circuit's opinion may shed light on the merits of both the Plaintiffs' claims and defenses raised by the Defendants, it does not, in itself, pose as a bar to Plaintiff Mazzone's standing. *See, e.g., Hill v. City of Houston*, 764 F.2d 1156, 1159 (5th Cir. 1985), *cert. denied* 483 U.S. 1001, 107 S.Ct. 3222 (1987) (Plaintiff's standing to litigate constitutionality of ordinance should not be confused with apparent merit or lack of merit in plaintiff's challenge).



Standing of Plaintiff Summers

Plaintiff Summers alleges that he makes regular use of the services of attorneys practicing in Texas, and that he has paid to his attorneys funds that have been placed in IOLTA accounts. Summers claims that the IOLTA Program collects and uses the interest generated by his funds for political and ideological causes he opposes, thereby depriving him of his rights of freedom of speech and association in violation of the First Amendment. Summers further claims that the IOLTA Program constitutes a taking of the beneficial use of those funds, in violation of the Fifth Amendment. These allegations, taken as true for the limited purposes of Fed. R. Civ. P. 12(b)(1), clearly state an injury to Summers, traceable to the Texas IOLTA Program, which may be remedied by the relief sought from this Court. Accordingly, the Court finds that Summers has standing to maintain his claims made in this action.

Standing of Plaintiff Washington Legal Foundation

For an organization to have standing to assert the interests of its members as a "representational plaintiff" requires a showing by the organization that

(a) its members would otherwise have standing to sue in their own right;

(b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit.

*Save Our Community v. U.S. Environmental Protection Agency*, 971 F.2d 1155, 1160 (5th Cir. 1992).

Both Plaintiffs Mazzone and Summers are alleged to be members of Plaintiff Washington Legal Foundation. As determined above, both Plaintiffs Mazzone and Summers have standing to sue in their own right. Thus, the first of the above-named factors is satisfied.

In its Complaint, Washington Legal Foundation states that it is a "nonprofit public interest law and policy center" which "devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference." The Complaint specifically alleges that the IOLTA Program deprives Plaintiffs Mazzone and Summers and members of Plaintiff Washington Legal Foundation "of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution." Thus, it is clear that the interests Plaintiff Washington Legal Foundation seeks to protect are germane to its purposes as an organization, thereby satisfying the second requirement for representational standing.

Finally, there is no indication that the claims asserted or relief requested requires the participation of individual members in the lawsuit (beyond the extent to which



members Summers and Mazzone are already taking part). The Supreme Court Defendants argue that, since the Plaintiffs in part seek a return of the interest generated by funds owned or deposited by the two individual Plaintiffs in this suit, Washington Legal Foundation must be denied standing according to the dictates of *Warth v. Seldin*. In *Warth v. Seldin*, the Supreme Court held that an organizational plaintiff lacks standing to seek relief for damages for alleged injuries to its members, where it does not allege any monetary injury to itself, nor any assignment of the damages claims of its members, and where any injury that may have been suffered is peculiar in both fact and extent to the individual member of the organization. *Warth*, 422 U.S. at 515-16, 95 S.Ct. at 2213-14. Such is not the case here. Under *Warth*, it is proper for an organizational plaintiff to seek declaratory, injunctive or other form of prospective relief, where such relief will be reasonably anticipated to inure to the benefit of the associations members. *Id*. This is the type of relief sought by Plaintiff Washington Legal Foundation in its Complaint. The only relief requested in the Complaint that requires individual participation and proof by Plaintiff Washington Legal Foundation's members is Mazzone's and Summers' request for a return of their interest. This obviously fails to be a bar to Plaintiff Washington Legal Foundation's standing, as these Plaintiff's are participating individually in this action. Therefore, the third prerequisite for representational standing is met.

Based on the foregoing, the Court finds that the Plaintiffs have standing to bring this action, and the

Court has jurisdiction to rule on the merits of their claims.

THEREFORE, IT IS ORDERED that the Motion to Dismiss filed by Defendants Thomas Phillips, Raul Gonzalez, Jack Hightower, Nathan Hecht, Lloyd Doggett, John Cornyn, Bob Gammage, Craig Enoch, and Rose Spector is hereby DENIED.

SIGNED this 21st day of September, 1994

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, MICHAEL J. MAZZONE, and WILLIAM R. SUMMERS | § | CIVIL NO. A-94-CA-081 JN |
| VS. | § | |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL A. GONZALEZ, JACK HIGHTOWER, NATHAN L. HECHT, LLOYD DOGGETT, JOHN CORNYN, BOB GAMMAGE, CRAIG T. ENOCH and ROSE SPECTOR. | § | |

ORDER

(Filed Oct. 19, 1994)

Before the Court are the Defendants' Motions to Dismiss, the Plaintiffs' Responses, and the Defendants' Reply to the Plaintiffs' Responses. A hearing was held regarding the aforementioned pleadings on September 14, 1994. Supplemental briefs were filed by the parties following that hearing. Having reviewed the record in this cause of action, as well as the arguments of counsel and the relevant law, the Court finds that the Defendants' Motion to Dismiss should be DENIED.

The Plaintiffs have filed this action claiming that the Texas IOLTA ("Interest on Lawyers' Trust Accounts")

Program violates the First and Fifth Amendments of the United States Constitution. The Texas IOLTA Program requires an attorney receiving client funds that are "nominal in amount" or "reasonably anticipated to be held for a short period of time" to place such funds in an unsegregated interest-bearing bank account. *See* State Bar Rules Governing Operation of Equal Access to Justice Program Rule 6 (*reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G app. (Vernon 1988)). Interest earned from these pooled IOLTA accounts is to be paid to the Texas Equal Access to Justice Foundation, a non-profit corporation. *Id.*, Rule 9. The Foundation is charged with administering these funds, awarding them as grants to non-profit organizations that have a primary purpose of delivering legal services to low income persons. *Id.*, Rules 10-12. The Plaintiffs allege that the Texas IOLTA Program violate the Constitution in at least two ways. First, they claim that the forced collection and use of the interest generated by client funds under the IOLTA Program effects a taking in violation of the Fifth Amendment. The Plaintiffs further claim that the forced use of interest generated by client funds to finance groups whose purposes they find objectionable constitutes compelled speech in violation of the First Amendment.

The Defendants have moved to dismiss the Plaintiffs' claims on the grounds that the Plaintiffs have failed to allege cognizable Fifth and First Amendment claims. When considering a motion to dismiss for failure to state a claim, the Court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d



278, 284 (5th Cir. 1993). Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 102-03 (1957); *Colle v. Brazos County, Texas*, 981 F.2d 237, 243 (5th Cir. 1993).

Given the high threshold for granting a motion to dismiss, and having reviewed the record in this case, the arguments of counsel, and the applicable law, the Court finds that the Plaintiffs have stated claims under both the First and Fifth Amendment that are sufficient to withstand the Defendants' Motion to Dismiss. While there is non-binding authority that has rejected similar challenges to IOLTA programs in effect in other jurisdictions,[1] the Court cannot conclude that the Plaintiffs' claims are entirely foreclosed or merit dismissal at this early stage.

ACCORDINGLY, IT IS ORDERED that the Motions to Dismiss filed by the Defendants in this cause of action are hereby DENIED.

SIGNED this 18th day of October, 1994.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

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[1] *See, e.g., Cone v. State Bar of Florida*, 819 F.2d 1002, 1004 (11th Cir.), *cert. denied* 484 U.S. 917, 108 S.Ct. 268 (1987); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 975-76 (1st Cir. 1993).

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, ET AL., | § | |
| | § | |
| v. | § | CIVIL ACTION NO. |
| | § | A 94 CA 081-JN |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, ET AL., | § | |
| | § | |
| | § | |

**ANSWER OF DEFENDANTS TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION**

(Filed Nov. 3, 1994)

Defendant Texas Equal Access to Justice Foundation and Defendant W. Frank Newton, in his official capacity as Chairman of the Texas Equal Access to Justice Foundation (hereinafter collectively referred to as "Defendants") deny any liability to Plaintiffs and answer their Complaint for Injunctive Relief as follows:

**FIRST DEFENSE**

Plaintiffs' Complaint for Injunctive Relief fails to state a claim upon which relief can be granted.

**SECOND DEFENSE**

1. In response to paragraph 1, Defendants admit that Plaintiffs purport to bring this lawsuit challenging



the Texas Interest on Lawyer's Trust Accounts ("IOLTA") program in Texas but deny that Plaintiffs are entitled to any of the relief requested in this lawsuit.

2. Defendants deny the allegations in paragraph 2.

3. In response to paragraph 3, Defendants admit that Plaintiffs purport to object to the Texas IOLTA program but deny that Plaintiffs have stated any causes of action under the First or Fifth Amendments to the U.S. Constitution and deny that Plaintiffs are entitled to the relief Plaintiffs request in this lawsuit.

4. Defendants admit the allegations in paragraph 4, except Defendants deny that Plaintiffs' claims have any merit.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5.

6. Defendants admit that Plaintiff Michael J. Mazzone is an attorney licensed to practice law in Texas and that he purports to bring this suit on behalf of himself and on behalf of his clients. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in paragraph 6.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7.

8. Defendants admit the allegations of paragraph 8.

9. Defendants admit the allegations of paragraph 9.

10. Defendants admit the allegations in paragraph 10.

11. Defendants admit the allegations in paragraph 11.

12. Defendants admit the allegations in paragraph 12.

13. Defendants admit the allegations in paragraph 13.

14. Defendants admit the allegations in paragraph 14.

15. Defendants admit the allegations in paragraph 15.

16. Defendants admit the allegations in paragraph 16.

17. Defendants admit the allegations in paragraph 17.

18. Defendants admit the allegations in paragraph 18.

19. Defendants admit the allegations in paragraph 19.

20. Defendants admit the allegations in paragraph 20.

21. Defendants admit the allegations in paragraph 21.

22. Defendants admit the allegations in paragraph 22.

23. Defendants admit the allegations in paragraph 23.

24. Defendants admit the allegations in paragraph 24.

25. Defendants admit the allegations in paragraph 25.

26. In response to paragraph 26, Defendants admit that there are state-law procedures for amending rules governing the State Bar of Texas, including, in some instances, a referendum. Defendants deny that a referendum was required to amend Article XI and the rules governing the operation of the Texas IOLTA Program.

27. Defendants admit the allegations in paragraph 27.



28. Defendants admit the allegations in the first sentence of paragraph 28, but deny that interest income generated by the Texas IOLTA program totals $10 million per year in recent years.

29. In response to paragraph 29, Defendants admit that the Texas IOLTA program provides funds to eligible organizations to provide legal services to eligible individuals. Defendants deny that IOLTA funds are used to support redistricting litigation. Defendants deny that plaintiffs' purported objections to the Texas IOLTA program state claims for relief under the First or Fifth Amendments to the U. S. Constitution. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in paragraph 29.

30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30.

31. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 31. Defendants admit that Plaintiff Mazzone, as an attorney, owes his clients certain fiduciary duties that are defined by the Texas Rules of Disciplinary Procedure, Texas statutory law and Texas common law. Defendants deny the remainder of the allegations in paragraph 31.

32. Defendants deny the allegations in paragraph 32.

33. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37.

38. Defendants deny the allegations in the first sentence of paragraph 38. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 38.

39. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. Defendants admit the allegations in paragraph 40.

41. Defendants admit that the State Bar Rules authorize the Texas Equal Access to Justice Foundation to notify the State Bar of Texas of the names of Texas attorneys who are not in full compliance with IOLTA program requirements, and that lawyers who fail to comply with



such IOLTA requirements despite being notified by the State Bar of Texas of their obligation to comply may be subject to immediate suspension. Defendants deny the remainder of the allegations in paragraph 41.

42. Defendants reallege and incorporate by reference their responses to paragraphs 1-41 in response to paragraph 42.

43. Defendants deny the allegations in paragraph 43.

44. Defendants deny the allegations in paragraph 44.

45. Defendants reallege and incorporate by reference their responses to paragraphs 1-44 in response to paragraph 45.

46. Defendants admit that the Fifth Amendment to the U.S. Constitution provides that private property shall not be taken for public use without just compensation. Defendants deny the remainder of the allegations in paragraph 46.

47. Defendants deny the allegations in paragraph 47.

48. Defendants reallege and incorporate by reference their responses to paragraphs 1-47 in response to paragraph 48.

49. Defendants deny the allegations in paragraph 49.

50. Defendants deny that Plaintiffs are entitled to any of the relief prayed for by Plaintiffs.

51. Any allegation in Plaintiffs' Complaint for Injunctive Relief not expressly admitted above is denied.

## THIRD DEFENSE

Plaintiffs' claims for relief are barred by the Doctrine of Sovereign Immunity.

## FOURTH DEFENSE

Plaintiffs' claims for relief are barred by the Eleventh Amendment.

Defendants reserve the right to amend their Original Answer based upon additional investigation and discovery of the claims made against them in this action.

WHEREFORE Defendants Texas Equal Access to Justice Foundation and W. Frank Newton in his capacity as Chairman of the Texas Equal Access to Justice Foundation demand that all relief sought by Plaintiffs be denied, that the Complaint for Injunctive Relief be dismissed with prejudice, that Defendants recover their court costs and attorney's fees in defending this action and for such other and further relief to which they may be entitled at law or in equity.

Respectfully submitted,

HUGHES & LUCE, L.L.P.
111 Congress Avenue, Suite 900
Austin, Texas 78701
(512) 482-6800
(512) 482-6859 (FAX)

By: /s/ Brittan L. Buchanan
Darrell E. Jordan
State Bar No. 00000064

H. Robert Powell
State Bar No. 16197000

Brittan L. Buchanan
State Bar No. 03285680

**ATTORNEYS FOR THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION DEFENDANTS**



## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 1994, a true copy of the foregoing Answer was mailed, certified mail, return receipt requested, to the following:

Mr. Daniel J. Popeo

Mr. Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036

Mr. Steven W. Smith
3608 Grooms Street
Austin, Texas 78705

Ms. Nancy Trease

Mr. Harry Potter
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711

Mr. Michael J. Mazzone
Nine Greenway Plaza, Suite 2300
Houston, Texas 77046

/s/ Brittan L. Buchanan
Brittan L. Buchanan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION *et al.*, *Plaintiffs,* | § | CIVIL ACTION |
| *v.* | § | NO. CA 94-081 |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION *et al.*, *Defendants.* | § | JN |

**ANSWER OF SUPREME COURT DEFENDANTS**

The Supreme Court defendants THOMAS R. PHILLIPS, RAUL A. GONZALEZ, JACK HIGHTOWER, NATHAN L. HECHT, LLOYD DOGGETT, JOHN CORNYN, BOB GAMMAGE, CRAIG T. ENOCH, and ROSE SPECTOR, Justices of the Supreme Court of Texas, answer the plaintiffs' complaint as follows:

1. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 1 of the complaint.

2. Defendants deny the allegations of paragraph 2.

3. Defendants are without sufficient knowledge to admit or deny the alleged objections of plaintiffs. Defendants deny that there has been any taking of IOLTA trust accounts in violation of the First or Fifth Amendments to the U.S. Constitution and deny that plaintiffs are entitled to the relief requested in this lawsuit.

4. Defendants admit the allegations of paragraph 4.



5. Defendants are without sufficient knowledge to admit or deny the allegations in paragraph 5.

6. Defendants admit that Plaintiff Michael J. Mazzone is an attorney licensed to practice law in Texas. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in paragraph 6.

7. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 7.

8. Defendants admit the allegations of paragraph 8.

9. Defendants admit the allegations of paragraph 9.

10. Defendants admit the allegations of paragraph 10.

11. Defendants admit the allegations of paragraph 11.

12. Defendants admit the allegations of paragraph 12.

13. Defendants admit the allegations of paragraph 13.

14. Defendants admit the allegations of paragraph 14.

15. Defendants admit the allegations of paragraph 15.

16. Defendants admit the allegations of paragraph 16.

17. Defendants admit the allegations of paragraph 17.

18. Defendants admit the allegations of paragraph 18.

19. Defendants admit the allegations of paragraph 19.

20. Defendants admit the allegations of paragraph 20.

21. Defendants admit the allegations of paragraph 21.

22. Defendants admit the allegations of paragraph 22.

23. Defendants admit the allegations of paragraph 23.

24. Defendants admit the allegations of paragraph 24.

26. In response to paragraph 26, Defendants admit that there are state-law procedures for amending rules governing the State Bar of Texas, including, in some instances, a referendum. Defendants deny that a referendum was required to amend Article XI and the rules governing the operation of the IOLTA program.

27. Defendants admit the allegations of paragraph 27.

28. Defendants admit the allegations in the first sentence of paragraph 28, but deny that interest income generated by the Texas IOLTA Program totals $10 million per year in recent years.

29. In response to paragraph 29, Defendants admit that the Texas IOLTA Program provides funds to certain organizations that meet the criteria of the Texas IOLTA Program and the such funds are used to provide legal services to low-income clients of such recipient organizations. Defendants deny that plaintiffs' objections to the Texas IOLTA Program state claims for relief under the First of Fifth Amendments to the U.S. Constitution. Defendants also deny that IOLTA funds are authorized for use in support of redistricting litigation or any other class action litigation Defendants are without sufficient knowledge to admit or deny the remainder of the allegations in paragraph 29.

30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30.



31. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 31. Defendants admit that Plaintiff Mazzone owes his clients certain fiduciary duties that are defined by the Texas Rules of Disciplinary Procedure, Texas statutory law and Texas common law. Defendants deny the remainder of the allegations in paragraph 31.

32. Defendants deny the allegations of paragraph 32.

33. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 33.

34. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 34.

35. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 35.

36. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 36.

37. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 37.

38. Defendants deny the allegations of the first sentence of paragraph 38. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 38.

39. Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 39.

40. Defendants admit the allegations of paragraph 40.

41. Defendants admit that the State Bar Rules authorize the Texas Equal Access to Justice Foundation to

notify the State Bar of Texas of the names of Texas attorneys who are not in full compliance with IOLTA program requirements, and that lawyers who fail to comply with such IOLTA requirements despite being notified by the State Bar of Texas of their obligation to comply may be subject to immediate suspension. Defendants deny the remainder of the allegations of paragraph 41.

42. Defendants reallege and incorporate by reference their responses to paragraphs 1-41 in response to paragraph 42.

43. Defendants deny the allegations of paragraph 43.

44. Defendants deny the allegations of paragraph 44.

45. Defendants reallege and incorporate by reference their responses to paragraphs 1-44 in response to paragraph 45.

46. Defendants admit that the Fifth Amendment to the U.S. Constitution provides that private property shall not be taken for public use without just compensation. Defendants deny the remainder of the allegations of paragraph 46.

47. Defendants deny the allegations of paragraph 47.

48. Defendants reallege and incorporate by reference their responses to paragraphs 1-47 of response to paragraph 48.

49. Defendants deny the allegations of paragraph 49.

50. Defendants deny that Plaintiffs are entitled to any of the relief prayed for by plaintiffs. To the extent that plaintiffs assert any claim to money damages, defendants assert that such claims are barred by the Eleventh



Amendment to the Constitution of the United States and by the sovereign immunity of the State of Texas.

WHEREFORE the Supreme Court defendants request that all relief sought by Plaintiffs be denied, that the Complaint for Injunctive Relief be dismissed with prejudice and for such other and further relief to which they may be entitled at law or in equity.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

TONI HUNTER, Chief
General Litigation Division

/s/ Nancy A. Trease
NANCY A. TREASE
State Bar No. 20205200
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
Phone No. (512) 463-2120
Fax No. (512) 320-0667

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via U.S. Mail, on November 3, 1994 to:

Michael J. Mazzone
2927 Georgetown
Houston, Texas 77005

Daniel J. Popeo

Richard A. Samp
Washington Legal
Foundation
2009 Massachusetts
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Washington, D.C. 20036

Darrell E. Jordan

H. Robert Powell

Brittan L. Buchanan
Hughes & Luce, L.L.P.
111 Congress Avenue,
Suite 900
Austin, Texas 78701

Stephen W. Smith
3608 Grooms Street
Austin, Texas 78705

/s/ Nancy A. Trease
NANCY A. TREASE
Assistant Attorney General

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, ET AL., Plaintiffs, | § | CIVIL ACTION NO. A 94 CA 081-JN |
| v. | § | |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, ET AL., Defendants. | § | |

## AFFIDAVIT OF BRUCE T. BUELL

### PERSONAL BACKGROUND

1. My name is Bruce T. Buell. My business address is Suite 1000, 90 South Cascade Avenue, Colorado Springs, CO 80903. My telephone number is (719) 475-7730. I am over 21 years of age, am of sound mind, and am fully competent to testify in this matter. I have personal knowledge of the facts contained herein and they are true and correct.

### PROFESSIONAL BACKGROUND

2. I am admitted to the practice of law in the State of Colorado and am a partner in the law firm of Holland & Hart. I received a Bachelor's Degree from Princeton University in 1953 and my LL.B. from the University of Denver College of law in 1958. I also attended Harvard Law School and George Washington University Law School. I was admitted to the Colorado Bar in 1958. I

joined Holland & Hart as an associate in 1958 and was admitted to the firm as a partner in 1964. I have been a partner with the firm continuously since that time. I practiced in our Denver office from 1958 through 1986 and in our Colorado Springs office from 1986 to the present.

## BANKING LAW EXPERIENCE

3. I worked in three different banks prior to commencing the practice of law. After joining Holland & Hart, I immediately began representing the Colorado Bankers Association, a principal client of the firm. In 1962, I became the lead attorney for the Colorado Bankers Association and was designated its general and legislative counsel. I served in that capacity until 1985. I have represented numerous banks throughout my legal career and for a period of five years was general counsel and a director of a bank in the Denver area. I have also represented the Federal Deposit Insurance Corporation and the Resolution Trust Company. I have been involved in the development of banking legislation and regulations both on the state and federal levels. I have written numerous articles on banking law subjects, have prepared a number of manuals for guidance of bankers and have addressed numerous banking seminars and groups. I am listed under the Banking Law specialty in "The Best Lawyers in America".



## IOLTA EXPERIECNE

4. I was the Chair of the Colorado Bar Association Committee which developed the Colorado IOLTA program starting in 1982. The Colorado program is called the Colorado Lawyer Trust Account Foundation ("COLTAF"). I drafted the application to the Federal Reserve Board and personally worked with the General Counsel of the Federal Reserve Board in order to obtain approval of IOLTA bank accounts for the Colorado program. I was principal draftsman of the Colorado Supreme Court Rule (DR 9-102) which authorized a voluntary IOLTA program. COLTAF commenced operations in 1983 as the fourth IOLTA program in the nation. I served as the first President of COLTAF. In 1988, I led the effort to convert COLTAF from a voluntary to a mandatory program and this was approved by the Colorado Supreme Court in February 1989. I was principal draftsman of the Rule approved by the Supreme Court. When Colorado adopted the Rules of Professional Conduct to replace the Code of Professional Responsibility in 1992, I acted as principal draftsman of Rule 1.15 concerning client trust accounts which was approved by the Supreme Court. I retired from the Board of Directors of COLTAF in 1992. On the national level, I was a member of the National Advisory Committee for IOLTA commencing in 1982 and became a member of the American Bar Association Commission on IOLTA soon after it was established in the late 1980's. I was Chair of the Banking Committee of the Commission. I also served as liaison between the ABA Commission on IOLTA and the American Bankers Association during my term on the commission. I retired from the Commission in 1992. I frequently have been asked to

consult on banking issues by various state IOLTA programs.

## SUMMARY OF OPINIONS

5. I have reviewed the pertinent Texas Rules of Professional Conduct (Rule 1.14), the State Bar of Texas Rules (Article XI) and the Rules Governing the Operation of the Texas Equal Access to Justice Program (collectively the "Rules").

6. Consistent with similar rules in other states, the Rules direct attorneys to deposit client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time ("eligible funds") in a separate interest-bearing "IOLTA" account at a financial institution. Such funds may be deposited in an unsegregated account. The interest on such an account is payable to the Texas Equal Access to Justice Foundation ("the Foundation").

7. The premise of the Rules is that these eligible funds cannot reasonably earn income to benefit individual clients for whom the funds are held (Art XI, Sec. 2(A)). The attorney is permitted to consider overhead costs in maintaining an account on which interest would accrue to the client in determining whether or not client deposits are eligible funds (Operational Rules, Rule 6). The Rules in these respects are consistent with ethical rules nationwide.

8. The Rules also require that the lawyers promptly deliver to the client any funds that the client is entitled to receive (Rule 1.14(b)). Accordingly, the Rules do not



deprive the client of any rightful possessory interest the client may have in his funds.

9. Traditionally, the only depository account which satisfied the three requirements of (i) federal deposit insurance, (ii) immediate availability of funds and (iii) bearing interest, has been the Negotiable Order of Withdrawal ("NOW") account. Financial institutions are authorized to establish and maintain NOW accounts under 12 U.S.C. § 1832 ("the Statute").

10. Under Section (a)(2) of the Statute, NOW accounts may consist " . . . solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for . . . charitable purposes." This section has been interpreted by the banking regulatory agencies to permit the Foundation and organizations similar to it in other states to benefit from the interest earned on client trust accounts on the grounds that the "beneficial interest" referred to in the statute is that of the person or organization entitled to the interest earned on the account.

11. The Statute has also been interpreted:

a) To permit an individual attorney, but not a partnership or corporate law firm, to establish a NOW account for its own business purposes; and

b) To permit any lawyer or law firm to establish a NOW trust account where the entire beneficial interest is in one or more individuals or charities.

12. While it is theoretically possible to establish a pooled client trust account with the interest paid to the clients as a NOW account, it would be contrary to the Statute if:

a) Any client whose funds were on deposit were other than an individual or a charity; or

b) The law firm deducted any of the interest earned on the trust account to cover its overhead in maintaining the account, calculating and disbursing interest to which the individual clients were entitled or covering the costs of preparing annual IRS form 1099's to report each individual client's interest. If the law firm were to invade the earned interest for these costs, the "entire beneficial interest" would not vest with the client.

These restrictions have generally inhibited lawyers, law firms and financial institutions from establishing NOW accounts for client trust funds other than as IOLTA accounts.

13. In a similar vein, it is theoretically possible to establish a pooled client trust account as a NOW account solely for individual clients (not partnerships or corporations) as noted in 11(a) above, and contract with the financial institution to perform the accounting and IRS reporting procedures for each individual client instead of the law firm performing these functions. This is sometimes referred to in the literature as "subaccounting." The cost of financial institution subaccounting would technically be deducted as a service charge or fee by the depository against earned interest. Subaccounting has not proven economical as the costs have exceeded the small amounts of interest earned on each individual's nominal or short term funds. Thus, no net interest is paid to the clients.

14. Nowhere in the Rules do I find any prohibition against a lawyer establishing a client trust account either



on a pooled or individual client basis, with the interest payable to the client, where the lawyer reasonably expects the account to earn net interest for the client. Operational Rule 6 ("eligible funds") is particularly helpful and constructive in guiding the lawyer to make the proper decision in each case. Rule 6 instructs the lawyer that:

a) The lawyer must consider the interest earned on the funds of each particular client, that is, he cannot set off the overhead costs relating to one client against the interest earned on funds of other clients (Rule 6 does not relate to whether the account is a separate individual account or a pooled account); and,

b) The lawyer must consider the likely "overhead costs" inherent in bank service charges and accounting. If he believes the service charges will be minimal or nil, and if he is prepared to do the accounting and tax reporting without charge, nothing in the Rules precludes the lawyer from establishing an account with interest paid to the individual client even with so-called "nominal or short term funds," so long as it can be legally done under the Statute (see paragraphs 10-12 above).

Further Affiant sayeth not.

/s/ Bruce Buell
Bruce T. Buell

STATE OF COLORADO )
) ss.
COUNTY OF EL PASO )

Subscribed and sworn to before me this 29th day of November, 1994, by Bruce T. Buell.

My Commission expires: May 2, 1995.

[SEAL]

/s/ Judith M. Schaefer
Notary Public

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, ET AL., | § | |
| Plaintiffs, | § | CIVIL ACTION No. A 94 CA 081-JN |
| v. | § | |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, ET AL., | § | |
| Defendants. | § | |

**AFFIDAVIT OF EUGENE COOK**

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared EUGENE COOK, who, after being duly sworn, stated as follows:

1. "My name is Eugene Cook. I am over twenty-one years of age, of sound mind, and in all things legally competent to testify in this matter. I have personal knowledge of the facts contained herein and they are in all things true and correct.

2. A biographical summary of my background and experience is attached hereto as Appendix 1.

3. I was a Justice of the Supreme Court of Texas in 1988 when the Court was evaluating whether to convert the Texas Equal Access to Justice Program (the "Texas IOLTA Program") from a voluntary program to a mandatory program. Based on the Court's opinion that a mandatory IOLTA Program would further the state's interest in providing equal access to justice, on December 13, 1988 the Court entered an Order converting the Texas IOLTA Program into a mandatory program.

4. The State Bar of Texas is an integrated bar. That is to say, an attorney that wants to practice law in this state must become a member of the State Bar. The source of the Bar's authority to regulate the practice of law in Texas is derived both from the Texas Legislature and the Supreme Court of Texas. The Supreme Court of Texas is charged with setting the standards for admission to the practice of the law in this state, as well as promulgating the standards of professional conduct Texas lawyers must follow in their law practice. By imposing ethical and professional standards on its member lawyers, the State Bar is fulfilling the state's interest of regulating the practice of law to assure that attorneys are not only professionally competent to render legal services, but that such services are rendered in an ethical and responsible manner. Accordingly, attorneys not only have ethical obligations to their clients, but owe ethical duties to the Judiciary, to fellow lawyers and to the public as a whole. It is important that lawyers conduct their profession in such a manner that inspires respect and confidence from the public. Such respect is most assured when the public perceives attorneys not only as persons engaged in their profession for pecuniary gain, but also as professionals charged with



the spirit of public service directed toward serving the interests of justice.

5. The public and the interests of justice are served when attorneys do their part in assuring that all persons have access to the legal system. In criminal cases, such access is facilitated by the state and federal court appointment system. In civil matters such access has traditionally been provided by lawyers through their acceptance of cases, *pro bono*.

6. In 1990, the Supreme Court of Texas adopted a version of the Model Rules of Professional Responsibility ("Disciplinary Rules"). The current rule regarding the safekeeping of client property, Disciplinary Rule 1.14, also requires that attorney's deposit client funds in trust accounts and that such funds be delivered on demand.

7. The Texas IOLTA Program represents an extension of attorneys' ethical responsibility to maintain client trust accounts.

8. While some Texas attorneys, including those party plaintiff in this case, may object to the IOLTA Program, it must be remembered that the practice of law is a privilege not a right. Because attorneys are entrusted with the operation of the legal system, the practice of law is regulated by the states through their respective bars to assure that attorneys render legal services in a competent and ethical manner. Accordingly, basic standards of professional competence govern the admission to practice law, and ethical rules govern the means which attorneys may employ in representing their clients. Lawyers are also obligated by the Bar and the Judiciary to render

certain services to the public, including accepting criminal appointments and *Pro Bono* cases. While attorney's may object to donating their services, such objections cannot constitute claims for relief because the attorneys have assumed such responsibilities upon deciding to practice to law in this state. As with any other ethical obligation, attorneys have assumed the responsibility of complying with IOLTA as well.

9. The Texas IOLTA Program does not implicate attorneys' property or associational rights. Attorneys have never had any property right to client funds nor the interest earned on such funds. Likewise, lawyers are not "associated" with the clients they are appointed to represent, or the clients they retain. Lawyers are only associated with the right to legal representation, not their client or the client's objective. Any perceived "association" by an attorney while representing a client does not have First Amendment implications. If there is any association, it is justified as part and parcel of the social responsibility lawyers assume when they become members of this regulated profession.

10. Clients do not have any greater associational rights in the attorney/client relationship than their lawyers do. Clients have a right to counsel of their choice, but they must chose [sic] counsel that is regulated by their respective State Bar. Clients accept the legal representation provided by their lawyers along with all of the ethical obligations imposed on such lawyers. To hold otherwise would impair the state's ability to regulate the practice of law. For example, several of the Texas Disciplinary Rules go the core of an attorney/client relationship such as the attorney/client privilege. Texas



Disciplinary Rule 1.05 recognizes a lawyers duty to maintain the confidential information relayed by clients, but also expressly recognizes that lawyers must disclose such confidential information when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act. Likewise, Texas Disciplinary Rule 1.02 prevents attorneys from assisting clients in engaging in criminal or fraudulent conduct. Texas Disciplinary Rule 3.03 prevents lawyers from knowingly allowing their clients to offer false evidence or testimony. Texas Disciplinary Rule 4.01 requires lawyers to disclose confidential information when it is required to avoid making the lawyer a party to a criminal or fraudulent act. Each of these rules impairs a lawyers ability to act in the unrestricted d rection of a client. Clients cannot object to their attorney's obligation to comply with the forgoing rules because clients are only entitled to obtain legal representation to employ means or accomplish goals that are within the parameter the state has set for its legal system. The Texas IOLTA Program is no different than any other ethical rule in that regard.

Further Affiant sayeth not.

/s/ Eugene A. Cook
Eugene Cook

STATE OF TEXAS )
) SS.
COUNTY OF HARRIS )

Subscribed and sworn to before me this 2nd day of December, 1994, by Eugene Cook.

My Commission expires:

/s/ Cheryl C. Palazzo
Notary Public

[SEAL]

CHERYL C. PALAZZO
Notary Public, State of Texas
My Commission Expires 7-27-96

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IN THE UNITED STATE [sic] DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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| WASHINGTON LEGAL FOUNDATION, MICHAEL J. MAZZONE, and WILLIAM R. SUMMARY [sic], Plaintiffs, | ) | CIVIL NO. A-94-CA-081 JN |
| v. | ) | |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL A. GONZALEZ, JACK HIGHTOWER, NATHAN L. HECHT, LLOYD DOGGETT, JOHN CORNYN, BOB GAMMAGE, CRAIG T. ENOCH, and ROSE SPECTOR, Defendants. | ) | |

**AFFIDAVIT**
**OF**
**ARTHUR J. ENGLAND, JR.**

BEFORE ME, the undersigned authority personally appeared Arthur J. England, Jr., who says:

1. My name is Arthur J. England, Jr. I am over 21 years of age and am competent to give this affidavit.

2. I have been asked by Hughes & Luce, L.L.P., counsel for Texas Equal Access to Justice Foundation in this proceeding, to express my opinion as to whether the

IOLTA program being challenged in this proceeding fulfills a compelling state interest. I have attached to this letter a biographical summary of my background and experience.

3. I have had significant experience with the formulation and operation of programs which provide interest on lawyers' trust accounts ("IOLTA programs"). As a Justice of the Supreme Court of Florida, I authored the decision of that Court which approved the first IOLTA program in the United States. (Appendix 2). I later authored the Court's opinion which made the Florida IOLTA program operational. (Appendix 3). My role with Florida's IOLTA program led to my involvement with other states that were exploring the concept. I served as chairman of the National IOLTA Clearinghouse, an informational body for jurisdictions interested in considering an IOLTA program, and as a member and chair of its successor organization, the American Bar Association's IOLTA Commission. I also served as an informal resource to numerous state high courts, legislative committees, bars and bar foundations throughout the country (including Texas, for which I was featured in a video presentation), and I formally appeared before several state high courts and the Conference of Chief Justices in connection with IOLTA.

4. A great deal has been written about the legal rights which IOLTA programs do or do not create, and what effect they have had on client funds which are deposited with attorneys. IOLTA programs are best understood, I believe, not through an explanation of how they were created or how they operate, but rather by



comparison with the world of lawyers' trust accounts before the first IOLTA program was adopted.

5. In every state prior to the adoption of an IOLTA program, including Texas before April 30, 1984, lawyers routinely accepted for deposit and safekeeping client funds which were to be used for a variety of purposes connected with their clients' affairs. Among the usual types of deposits made by clients with their attorneys were those designed to be expended on behalf of the clients, such as court costs, filing fees and real estate purchase deposits, and those which represented fee retainers for legal services which had not yet been performed and advance deposits for law firm expenditures which had not been incurred. Under universal rules governing attorneys from their respective state regulatory authorities, and under federal banking laws, all of these funds had three common characteristics.

a. First, the deposits received from clients were aggregated into so-called "trust accounts" held by attorneys in their law firms' names, rather than being deposited on a client-by-client basis. These trust accounts, which comprised commingled client funds, were independent of and maintained separately from the operating accounts by which attorneys conducted the affairs of their law firms.

b. Second, attorney trust accounts were held in non-interest bearing accounts with banking institutions.

c. Third, attorneys were prohibited from benefitting in any way from the trust accounts comprising their clients deposits.

Exemplary of the rules which governed attorneys throughout the country prior to the advent of IOLTA programs was the Texas trust account rule which existed prior to April 30, 1984. (Appendix 4).

6. Prior to the advent of IOLTA programs, no clients earned income on the funds which had been deposited with their attorneys, obviously, as the funds were held in *non*-interest bearing accounts and generated no tangible income whatsoever. Although earnings free to the depositing clients, the interest-free funds held in attorney trust accounts nonetheless constituted productive capital. Those aggregated accounts served to benefit the banks in which the accounts were established by allowing those financial institutions to invest the funds and retain for themselves the earnings thus generated. Notably, the earnings generated on those aggregated trust accounts were not subject to any direction or control by either the attorneys who maintained the accounts, or by the clients of those attorneys from whom the deposits came. Indeed, to the best of my knowledge, no client ever asserted a claim against the earnings of a bank which were produced on the free funds held in aggregated trust accounts established by attorneys, either on the ground of a First Amendment right not to associate with the causes which the bank might support, or as a Fifth Amendment right to be paid the sums earned by those financial institutions under a "fruit of the tree" theory such as was described by the United States Supreme Court in *Himely v. Rose*, 9 U.S. (5 Cranch) 313 (1809).

7. During this pre-IOLTA era, banks were free to use the interest generated on client funds held by their attorneys in those financial institutions for any purpose



whatsoever, including contributions to the charitable objects of the financial institutions' choice, expenditures for lobbying on behalf of financial institutions in state legislatures and Congress, and simply distributions to the owners or shareholders of the financial institutions. During this period, clients had no control over their attorney's choice of the banking institution into which these funds would be deposited (except to the extent that attorneys represented financial institutions which insisted that all accounts of the law firm be maintained with those client institutions).

8. Most significantly, in pre-IOLTA days no client obtained any income on their deposits with attorneys, unless the amounts on deposit were held for such a significant period of time or were large enough to generate income, *and* if the attorney (and/or client) determined that the deposited funds would in fact be invested for the client independent of the attorney's commingled trust account. Clients deposits incapable of generating income by reason of their size or length of retention were routinely placed by attorneys in their unproductive, commingled, non-interest bearing trust accounts.

9. During the pre-IOLTA era, either a state legislature or a state high court, depending on the constitution of each state, maintained control over the manner by which attorneys used clients' funds and maintained them. Exemplary of the type of control maintained over attorneys' trust accounts was the rule adopted by the Florida Supreme Court for the establishment, maintenance and operation of attorneys' trust accounts. (Appendix 5).

10. With the adoption of Florida's IOLTA program in 1978, attention was focused on the legal, ethical, tax and constitutional aspects of attorneys' maintenance of client funds in commingled trust accounts.

a. The legal requirements *had* changed when the United States Congress authorized the creation of NOW accounts, and subsequently gave banking institutions the freedom to allow the payment of interest on all checking accounts.

b. The ethical obligations of attorneys with respect to client funds *did not* change, although the subject was addressed over the next several years through the agencies responsible for governing the ethics of lawyers in each state – either the high court or legislative body of the respective states. Advice for these respective governing authorities was provided by the American Bar Association. See Opinion 348 of the ABA Standing Committee on Ethics and Professional Responsibility (July 23, 1982).

c. Nor did the tax ramifications of client trust funds held by attorneys change, although the subject of IOLTA programs was specifically addressed by the Internal Revenue Service. See Rev. Rul. 81-209.

d. The constitutional aspects of IOLTA programs drew the most concern, and generated extensive decisional analysis by the courts. *But the fundamental nature of client trust funds held in IOLTA programs was unchanged from the pre-IOLTA era, in terms of the constitutional doctrines of the property and associational rights of clients.* Constitutional issues were considered at length



in a series of state and federal appellate decisions, including several state high court decisions which adopted IOLTA programs. The widespread view, on exhaustive analysis, was that there was no constitutional infirmity in IOLTA programs.[1]

11. The common ground among the decisions which either approved IOLTA programs or found no constitutional defects, although not always mentioned as such, was the reality that nothing really changed with the advent of IOLTA programs as respects lawyer commingled trust accounts, *except* two constitutionally irrelevant things.

a. First, the earnings on client deposits were generated overtly for the first time, rather than being generated invisibly on the profit and loss statements of banking institutions. This was relevant in practical, albeit non-constitutional terms, because the federal tax laws do not treat as "taxable income" the imputed earnings on free funds held by banks. This phenomenon of congressional choice has been recognized by the courts, which observed in terms significant only for federal income tax purposes that IOLTA "created income" where none previously existed.

b. Second, those earnings went for beneficial purposes related to the administration of justice, rather than for the private purposes which were determined exclusively by the banking institutions.

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[1] Several of these decisions are attached as composite Appendix 6.

12. The notion of newly-created income where none previously existed provided the answer to the various constitutional challenges which opponents of IOLTA programs had raised. In an economic sense, of course, *nothing* had changed from pre-IOLTA money management in the terms of the rights or interests of clients vis-a-vis the funds they deposited with their attorneys. IOLTA programs only created the opportunity for certain groups of clients, and their attorneys, to raise previously unthought-of assertions as to "rights" in the newly-visible proceeds of commingled attorney trust accounts – groups who opposed the delivery of legal services to the poor (the dominant use of IOLTA program funds) as a matter of principle. That is, the very success of IOLTA programs in providing funds for the delivery of legal services to the poor allowed opponents of such programs to argue in constitutional terminology that the funding of the delivery of such services did not fulfill a compelling state interest.

13. I have been asked whether such a state interest *is* met when state courts or legislatures determine that the poor should be given access to courts and attorneys through IOLTA programs. I have no hesitation in saying that these programs *do* fulfill compelling state interests. I pause to restate, however, that I do not consider it even relevant to ask whether there exists a compelling state interest, because there exists in clients no property right of any nature in the earnings on their deposits with attorneys. Individual client deposits so small in amount or so briefly held that earnings could not be generated on



them before 1978 had the same constitutional characteristics, when aggregated in attorney trust accounts providing massed capital to banks, as individual client deposits have now that the earnings on massed capital are disgorged by the banks for the improvement of the administration of justice.

14. The several states in this country establish their policies and compelling state interests through each branch of their governments. The legislative branch, of course, declares public policy and compelling state interests through the enactment of laws. The executive branch does so by executive order or decree, such as would be the case in a declaration of a state of emergency following a natural disaster. The judicial branch, likewise, establishes public policy and compelling state interests through court decisions and orders which affect the administration of justice.

15. Examples of court-created, compelling state interests are the creation of a public defender system following the United States Supreme Court's adoption of the *Gideon* decision (where courts rather than legislatures did so), the maintenance of disciplinary powers over attorneys for breaches of professional duties (including removal from the profession), and the maintenance of the very operations of the court systems through the appointment of attorneys upon a showing of indigency.

16. The dual foundations for IOLTA programs are the public service component of the legal profession imposed by the judicial branch in connection with the admission and discipline of attorneys, and the requirement that there be legal representation for all persons

who utilize the state courts. (See, for example, Appendix 7). These are indeed compelling state interests. IOLTA programs evidence a legitimate regulation of the legal profession, aimed solely at improving the delivery of legal services to the people of this country by enhancing their access to the legal system. IOLTA programs, such as the one in operation in Texas, accomplish the goal of equal access without affecting the attorney/client relationship with respect to the maintenance of client funds, and without taking from clients anything they previously could or did possess.

In my opinion, objections to the Texas IOLTA program on the basis of client-perceived property and associational rights do not rise to any constitutional proportion.

/s/ Arthur J. England, Jr.
Arthur J. England, Jr.

STATE OF FLORIDA )
) SS:
COUNTY OF DADE )

Sworn to and subscribed before me on November 22, 1994. **Arthur J. England, Jr.** personally appeared before me, is personally known to me, and did not take an oath.

Notary: /s/ Clara Torres
Print Name: CLARA TORRES
Notary Public, State of Florida
My commission expires: April 10, 1997



[SEAL]
OFFICIAL NOTARY SEAL
CLARA TORRES
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC267803
MY COMMISSION EXP. APR. 10, 1997

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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|---|---|---|
| WASHINGTON LEGAL FOUNDATION, ET AL., Plaintiffs, | § | CIVIL ACTION NO. A 94 CA 081-JN |
| v. | § | |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, ET AL., Defendants. | § | |

**AFFIDAVIT OF W. FRANK NEWTON**

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared W. FRANK NEWTON, who, after being duly sworn, stated as follows:

1. "My name is W. Frank Newton. I am over twenty-one years of age, of sound mind, and in all things legally competent to testify in this matter. I have personal knowledge of the facts contained herein and they are in all things true and correct.

2. A biographical summary of my background and experience is attached hereto as Exhibit A.

3. I am Chairman of the Texas Equal Access to Justice Foundation (the "Foundation"). The Foundation is



responsible for operating the Texas Equal Access to Justice Program (the "Texas IOLTA Program") pursuant to Art. XI of the State Bar Rules and the Rules Governing the Operation of the Texas Equal Access to Justice Program (the "IOLTA Rules").

4. In the late 1970's, state bars across the country awoke to the idea that the interplay between an attorney's ethical obligations with respect to the management of client funds and federal banking regulations could allow state bars to do more to provide equal access to legal services in civil matters. If the bar established a non-profit organization, lawyers could deposit certain client funds in accounts where the interest earned on such accounts would be designated to be paid to such non-profit organization. In turn, the bar's non-profit organization could distribute the accumulated funds to non-profit legal services organizations whose primary purpose is the delivery of legal services to the poor. This concept is commonly referred to as an Interest On Lawyer Trust Accounts Program ("IOLTA").

5. The IOLTA concept is a unique process that allows the accumulation of client funds to create a benefit previously enjoyed only by the financial institution retaining the deposits. IOLTA functions because of the unique relationship between attorneys and clients with respect to the management of nominal funds or funds held by the attorney for a short period of time. Under the Texas IOLTA Rules, a lawyer who is presented short-term or nominal funds by a client is required to make an initial determination of whether such funds can be deposited into an account that is capable of returning net interest to that client. If such an account is available, the lawyer is

free to deposit the client's funds into such an account. If such an account is not available, the IOLTA Rules merely requires a lawyer to deposit the funds into a reasonably available pooled IOLTA fund.

6. The manner in which Texas lawyers maintain client funds had long been governed by the Texas Code of Professional Responsibility. Former Disciplinary Rule 9-102 required that all client funds paid to a lawyer or law firm be maintained in a bank account. Such funds must be continually accounted for by the lawyer, and must be promptly returned to the client as requested. Former Disciplinary Rule 9-102 also prohibited lawyers from commingling clients funds with their own. Accordingly, Texas lawyers were prohibited from pooling client funds in an interest bearing trust account in order to benefit from that interest. The current rule regarding the safekeeping of client property, Disciplinary Rule 1.14, also requires that attorneys deposit client funds in trust accounts and that such funds be delivered on demand. Due to the ethical obligation that a lawyer remit client funds on demand, attorneys could not deposit funds in interest bearing accounts to benefit their clients because historically banks only paid interest on deposits for term. With the advent of negotiable order on withdrawal ("NOW") accounts, attorneys had the option of depositing client funds in a NOW account when such funds were sufficient to generate interest that would net a return to the client. Due to the limitations the Federal Banking Regulations imposed on the entities entitled to maintain NOW accounts, however, there remained many instances where client funds could not be deposited in an



interest bearing checking account. Despite the new availability of NOW accounts, in order to comply with their ethical obligations lawyers continued to deposit significant sums of money in non-interest bearing accounts. Of course, the "non-interest bearing" aspect of such accounts only applied to the depositors. Banks had long benefited from the accumulation of depositors funds in their reserve accounts where they earned interest that profited the bank. In other words, the Texas IOLTA Program merely diverts the formerly unseen accumulation of interest from the depository banks to the Foundation. In so doing, funds can now be accumulated for distribution to other non-profit organizations whose sole purpose is to provide legal services to the poor. Accordingly, the Texas IOLTA Program is a legitimate regulation of the legal profession aimed at improving the quality of the legal service available to *all* the people of Texas.

7. The Texas IOLTA Program was first created by order of the Supreme Court of Texas in 1984. In so doing, Texas joined a growing number of states that implemented an IOLTA Program to address the continuing unmet need for legal services experienced by the poor. The original Texas IOLTA Program was voluntary. After the voluntary program had been in operation for several years, it became apparent that the funds raised through a voluntary program were insufficient to make a significant impact on the legal needs of the state's poor. The Supreme Court of Texas ordered a study to be conducted by an IOLTA study commission to evaluate the voluntary IOLTA program and determine whether the program was meeting the legal service needs of the state's poor and whether a mandatory program would further meet those

needs. I was a member of that IOLTA study commission. The IOLTA study commission concluded that the legal service needs of the poor were not being fully met under the voluntary program and issued a report recommending to the Supreme Court of Texas that the Texas IOLTA Program be converted into a mandatory program. A true and correct copy of the Report of the IOLTA Study Commission is attached hereto as Exhibit B. At the same time, the American Bar Association ("ABA") was encouraging state bars across the nation to convert their voluntary IOLTA programs into mandatory ones. Based on the IOLTA study commission's report and encouragement by the ABA, the Supreme Court of Texas entered an Order on December 13, 1988 converting the Texas IOLTA Program into a mandatory program. Under the voluntary program the Foundation only distributed approximately $2,318,000 in grants. The success of the mandatory program has been astounding. Since 1992, the Foundation's annual reports indicate that it has distributed at least $18,000,000 in grants.

8. By Order of the Supreme Court of Texas, the Foundation has state-wide authority to act, and carries out the Court's recognized obligation to provide access to the legal system for all Texans on a state-wide basis. Without the power granted to it by the Court, the Foundation would have no power to act, as it serves entirely at the pleasure of the Court. Accordingly, the Foundation functions as an arm or agency of the Court. The Foundation is also analogous to a division of the State Bar of Texas, as the bar promulgated rules regarding compliance with the Foundation's mandates.



9. The conversion of the Texas IOLTA Program from a voluntary program to a mandatory one had no effect on an attorney's ability to place client funds into a non-IOLTA account if the funds would generate net interest to the client. Lawyers have always owed their clients a certain responsibility with respect to the management of client funds. These responsibilities include a prohibition on commingling an attorney's funds with the funds of his clients, and the requirement that client funds must be maintained in trust accounts. The mandatory nature of the Texas IOLTA Program merely requires lawyers to place funds incapable of generating net interest to individual clients into IOLTA accounts rather than accounts where the depository banks would retain the interest. In this regard, the Texas IOLTA Texas Program is essentially an extension of the Rules of Professional Conduct with respect to client funds. Operation of the Texas IOLTA Program is not expressive nor is it intended to have any communitive quality at all. IOLTA's only goal is to provide a process that enables persons to obtain legal services who, because of their economic condition, would not otherwise have access to such services. All grants are awarded in a content-neutral manner. Recipients are targeted on an economic basis, focusing on the needs within a geographic region and a potential recipient organization's fiscal responsibility. The Grant Application published by the Foundation reflects the content-neutral manner of the grant process. A true and correct copy of the Grants Package distributed by the Foundation in the Spring of 1994 is attached hereto as Exhibit C. Eighty-five percent of available Foundation funds are awarded to meet the unmet needs for legal services experienced in

those counties in which the greatest number of impoverished individuals reside. The remaining fifteen percent of available Foundation funds are awarded to meet special unmet needs that are not geographic in nature.

10. IOLTA funds are not awarded to promote any particular ideology or political agenda. In fact, no consideration is given to the political or ideological character that might be attributed to a recipient organization. The IOLTA Rules expressly prohibit grant recipients from using funds for reasons other than providing individuals access to the legal system. Moreover, IOLTA funds cannot be used to fund class-action lawsuits, lawsuits against governmental entities, or political lobbying. Finally, the recipient organizations generally do not acknowledge in any public way that they are supported by IOLTA monies. It is virtually impossible for anyone to be associated with the subject matters of the litigation brought by the persons who are the beneficiaries of the recipient organizations. The Foundation has never considered it necessary to put a disclaimer in its materials that IOLTA, as a funding source, does not necessarily support or advocate any of the positions advocated by any litigant who receives legal services as a result of funding provided through IOLTA.

11. Such disclaimers have not been published because, until the present suit was filed, no one foresaw that such an association would be a cause of concern to anyone. For example, the perceived association of which Plaintiffs complain is so attenuated that truly no possibility exists that Plaintiffs could be identified with the views of those asserting the legal claims of which they object. Plaintiffs tender funds to attorneys who, in turn,



deposit those funds into a bank account that may earn interest eventually paid to the Foundation, which in turn distributes the monies to qualified recipient organizations who, in turn, hire personnel to provide legal services to qualified impoverished persons, some of whom may have a legal problem which will require a lawyer to advocate a position on behalf of the qualified individual to which Plaintiffs may object.

12. In any event, the Texas IOLTA Program is only enforceable against lawyers. Neither clients nor banks are required to comply. In that regard, it should not be forgotten that client's also have the freedom of choosing their lawyers. For example, one lawyer might require a retainer of nominal or short-term funds while another attorney may not. And, even if an attorney requests a short-term or nominal retainer, the client is free to negotiate an alternative financial arrangement with the attorney if he desires. Of course, the IOLTA Rules do not prohibit lawyers from structuring their agreement regarding the management of client funds in such a way that nominal or short-term deposits are never held in trust by the lawyer. Lawyers are not required to fund IOLTA with their own money or with bar dues, but are merely required to account for client funds that are nominal or short-term in amount in a different fashion. Of course, the principal amount of the funds tendered by the client in trust is *never* affected by the Texas IOLTA Program. Principal funds are maintained in a trust account just as if there were no IOLTA Program. All the Texas IOLTA Program does is direct that the interests earned on those funds be delivered to the Foundation rather than remain with the depository bank.

13. As evidenced by the forgoing discussion, the Texas IOLTA Program serves a significant and compelling state interest and is narrowly tailored to serve that interest without infringing constitutional rights. It is indisputable that our government has a significant and compelling interest in providing its citizens full access to the legal system. It is equally clear that government has a significant and compelling interest in regulating the legal profession to ensure that such access is facilitated by the ethical and competent provision of legal services by attorneys. IOLTA is an expression of both these state interests. There remains a substantial number of poor in need of legal services in this state. Although such need should be beyond question, in 1990-1992 the State Bar of Texas conducted a Needs Assessment Survey to evaluate where such needs were the greatest. A true and correct copy of the Needs Assessment Survey conducted by the State Bar of Texas is attached hereto as Exhibit D. The State's interest in providing equal access to the legal system would be achieved less effectively if the current Texas IOLTA Program did not exist. If the Texas IOLTA Program did not exist, literally tens of thousands of Texans would be without access to the legal system.

Further Affiant sayeth not.

/s/ W. Frank Newton
W. Frank Newton



STATE OF TEXAS )
) SS.
COUNTY OF TRAVIS )

Subscribed and sworn to before me this 2nd day of December, 1994, by W. Frank Newton.

My Commission expires:

/s/ Cheryl Taylor
Notary Public

[SEAL]

Cheryl Taylor
Notary Public, State of Texas
My Comm. Expires 01/04/97

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**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| **WASHINGTON LEGAL FOUNDATION, *et al.*** | ) | |
| Plaintiffs, | ) | **Civ. Action No.** |
| v. | ) | **A94 CA 081-JN** |
| **TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, *et al.*,** | ) | |
| Defendants. | ) | |

**AFFIDAVIT OF MICHAEL J. MAZZONE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

MICHAEL J. MAZZONE states as follows:

1. I am a citizen of Houston, Texas. I make this affidavit in support of Plaintiffs' motion for summary judgment. I have personal knowledge of the matters stated herein.

2. I am an attorney licensed to practice law in Texas and am a shareholder in the law firm of Dow, Cogburn & Friedman, P.C. (the "Law Firm") in Houston, Texas.

3. In accordance with Article XI of the State Bar Rules and the Rules Governing the Operation of the Texas Equal Access to Justice Foundation (the "Rules"), the Law Firm maintains an IOLTA account into which I regularly place client trust funds that either are nominal in amount or are reasonably anticipated to be held for a short period of time.



4. I have determined from experience that as a practical matter I cannot operate my law practice without collecting client funds that are either nominal in amount or are reasonably anticipated to be held for a short period of time. I have also determined that funds falling within those categories cannot practicably be placed into separate interest-bearing accounts, because the additional costs of establishing and maintaining such accounts usually would exceed any interest I could earn for my clients.

5. Accordingly, as I have interpreted Article XI and the Rules, I have no choice but to place funds described in Paragraph 4 into the Law Firm's IOLTA account. I have had my clients' funds on deposit in that account at all times for the past several years.

6. I have reviewed the Texas Equal Access to Justice Foundation's (TEAJF) most recent annual reports, in particular those pages in the reports (attached) that list the names of organizations to which TEAFJ [sic] provides funds and the litigation activity for which those funds are earmarked. I oppose the objectives of some of the listed litigation activity and therefore object to being forced to associate with such activities by being required to deposit client trust funds into the Law Firm's IOLTA account. I also object, as trustee for my clients, to TEAJF's expropriation of the interest generated by the use of my clients' funds; if such interest is to be generated, it ought to be paid to my clients. I also object to being prevented from fully carrying out my fiduciary responsibilities to my clients by not being permitted to afford my clients the option of designating that their trust funds not be placed into the Law Firm's IOLTA account.

7. I am a member of the Washington Legal Foundation (WLF) and have asked WLF to assist me in protecting my constitutional rights and those of my clients, which I believe are being infringed by the TEAJF activities described above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of December, 1994.

/s/ Michael J. Mazzone
MICHAEL J. MAZZONE

SWORN TO AND SUBSCRIBED BEFORE ME on this the 1st day of December, 1994.

[SEAL]
MARY G. GRUSH
Notary Public,
State of Texas
My Commission Expires
4-7-95

/s/ Mary G. Grush
NOTARY PUBLIC,
STATE OF TEXAS

My Commission
Expires: 4-7-95

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**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| **WASHINGTON LEGAL FOUNDATION,** *et al.* | ) | |
| Plaintiffs, | ) | **Civ. Action No.** |
| v. | ) | **A94 CA 081-JN** |
| **TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,** *et al.*, | ) | |
| Defendants. | ) | |

**AFFIDAVIT OF WILLIAM R. SUMMERS**
**IN SUPPORT OF PLAINTIFFS'**
**MOTION FOR SUMMARY JUDGMENT**

WILLIAM R. SUMMERS states as follows:

1. I am a citizen of Missouri City, Texas. I make this affidavit in support of Plaintiffs' motion for summary judgment. I have personal knowledge of the matters stated herein.

2. I am a businessman. My work requires me to make regular use of the services of attorneys.

3. The attorneys whom I have retained have on occasion – as a condition of their agreement to represent me – required that I pay them a retainer fee. The attorneys have not applied the retainer against future legal services; rather, I have been billed separately for those services. The retainer has been held in trust for me by the attorneys, with the understanding that it would be returned to me at the conclusion of the matter giving rise

to the legal representation. It was my understanding that the attorneys would draw against the retainer if I failed to pay my legal bills in a timely manner.

4. In December 1992, I was named as a defendant in civil litigation which arose in connection with one of my business ventures. Pursuant to the agreement under which I hired an attorney to represent me, I paid the attorney a small retainer fee as outlined in Paragraph 3 above – my attorney holds the full amount of the retainer and bills me for services rendered on a periodic basis. The litigation is on-going, and the attorney continues to hold the retainer.

5. In January 1994, my attorney informed me for the first time that he had deposited the retainer into his law firm's IOLTA account and that all interest earned on that account is paid to the Texas Equal Access to Justice Foundation (TEAJF) in order to support Texas's IOLTA program.

6. I subsequently informed my attorney that I did not want my funds used to support the Texas IOLTA program and thus objected to his placement of my retainer into his law firm's IOLTA account. He responded that he was required by state law to keep the funds in that account because under state law his only other option was to set up a separate account for my funds – an unfeasible option because the cost of establishing and administering a separate account for my funds most likely would exceed any interest that could be earned on those funds.



7. If interest is to be generated through the use of my funds, I object to those funds going to anyone other than me.

8. I have reviewed TEAJF's most recent annual reports, in particular those pages in the reports (attached) that list the names of organizations to which TEAJF provides funds and the litigation activity for which those funds are earmarked. I oppose the objectives of some of the listed litigation activity and therefore object to the use of my funds to support those activities.

9. I am a member of the Washington Legal Foundation (WLF) and have asked WLF to assist me in protecting my constitutional rights, which I believe are being infringed by the TEAJF activities described above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of December, 1994.

/s/ William R. Summers
WILLIAM R. SUMMERS

SWORN TO AND SUBSCRIBED BEFORE ME on this the 1st day of December, 1994.

/s/ Sheila Litchfield
NOTARY PUBLIC,
STATE OF TEXAS

My Commission Expires:____

[SEAL] SHEILA LITCHFIELD
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
FEB. 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, MICHAEL J. MAZZONE, and WILLIAM R. SUMMARY [sic], | ) | |
| Plaintiffs, | ) | CIVIL NO. A-94-CA-081 JN |
| v. | ) | |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL A. GONZALEZ, JACK HIGHTOWER, NATHAN L. HECHT, LLOYD DOGGETT, JOHN CORNYN, BOB GAMMAGE, CRAIG T. ENOCH, and ROSE SPECTOR, | ) | |
| Defendants. | ) | |

**AFFIDAVIT**

**OF**

**CHARLES E. ROUNDS, JR.**

BEFORE ME, the undersigned authority personally appeared Charles E. Rounds, Jr., who says:

1. My name is Charles E. Rounds, Jr. I am over 21 years of age and am competent to give this affidavit.

2. I was counsel to the exclusive managers of a two hundred year trust established under the will of Benjamin



Franklin (the "Franklin Trust"). The Franklin Trust terminated June 30, 1991. I am currently counsel to The Franklin Foundation as it is trustee of trusts established by the Commonwealth of Massachusetts and the City of Boston with terminating distributions from the Franklin Trust.

3. I am co-author of the Seventh Edition of *Loring: A Trustee's Handbook* (Little, Brown & Co.-1994). The Handbook will have its one hundredth anniversary in 1998.

4. I am author of *Social Investing, IOLTA, and the Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds*, 22 Loyola University of Chicago Law Journal 163 (1990).

5. I am a tenured full professor of law at Suffolk University Law School, in Boston, Massachusetts. I have taught trusts at Suffolk since 1978.[1]

6. From 1977 to 1983, before accepting a full-time appointment at Suffolk University Law School, I was employed by The First National Bank of Boston, first in its Office of Trust Counsel and then in the General Counsel's Office. In both capacities, I specialized in trust-related matters.

7. I have reviewed the November 22, 1994 affidavit of Arthur J. England, Jr. (the "Affidavit") which was attached to the Defendants' Motion for Summary Judgment in this case. The Affidavit contains a number of

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[1] From 1978 to 1983 I taught trusts as a member of the Suffolk University Law School adjunct faculty. During that period I was serving in the Office of Trust Counsel and then in the General Counsel's Office at The First National Bank of Boston (now known as the "Bank of Boston").

factual inaccuracies. Moreover, the Affidavit obfuscates the fundamental legal relationships inherent in the Texas IOLTA scheme.

8. The legal relationships between and among the parties have never been in dispute and are as follows:

a. The **attorney** is the trustee of IOLTA funds;[2]

b. The bank in which IOLTA funds are deposited is in a debtor/creditor (contractual) relationship **with the attorney-trustee**;

c. The client is a beneficiary of the commingled IOLTA trust and the holder of a general inter-vivos power of appointment with respect to that portion of the trust principal allocable to the client;

d. **THE BANK IS NOT A TRUSTEE OF IOLTA FUNDS**; and

e. **THE CLIENT IS NOT IN A CONTRACTUAL RELATIONSHIP WITH THE BANK.**

9. In Para. 4 of the Affidavit it is suggested that "IOLTA programs are best understood . . . not through an explanation of how they were created or how they operate, but rather by comparison with the world of lawyers' trust accounts before the first IOLTA program was adopted." Yet, whether the client-beneficiary's equitable

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[2] In Para. 2 a. of the Affidavit, reference is made to "so-called" trust accounts. They *are* trusts. The relationship between the attorney and the client with respect to the funds is not that of principal/agent or debtor-creditor. The qualification "so-called" suggests that the term "trust" is inaccurate in the context of IOLTA. The Affidavit, however, contains no explanation as to why that would be the case.



or beneficial interest in the trust property (its "use") is being taken by the state is soley [sic] dependent upon **how** the scheme **now** operates. It has nothing whatsoever to do with the "world of lawyers' trust accounts" before 1978.

10. In Para 6. of the Affidavit there is the following statement:

> "Indeed, to the best of my knowledge, no client ever asserted a claim against the earnings of a bank which were produced on the free funds held in aggregated trust accounts established by attorneys . . . "

This statement presupposes that the bank is the trustee. It is not. The bank is only a debtor of the attorney-trustee. As such, the funds are properly commingled with the general assets of the bank. The Plaintiffs are *not* asserting a claim against the "earnings of a bank." The client-beneficiaries are asserting that when there is a choice as to how **their own entrusted property** is to be used, they have a Fifth Amendment right to make that choice. The type of entrusted property at issue here is the contractual obligation of the bank (i.e. the account).

11. In Para. 10 b. of the Affidavit it is suggested that when the United States Congress authorized the creation of NOW accounts, "[t]he ethical obligations of attorneys with respect to client funds *did not* change." Of course they did. Now the individual client-beneficiary has a practical choice as to how **his own property** could be invested: namely, either in an interest-bearing account or a non-interest-bearing account. The attorney, serving in two separate fiduciary capacities (as trustee of the client's

property and as attorney-at-law) had a double fiduciary duty to act soley [sic] in the interest of his client-beneficiary. He became obliged under the common law, if nothing else, to apprise the client-beneficiary of that choice and to facilitate the making of that choice. The attorney-trustee ought not to be subject to license suspension for carrying out his common law fiduciary obligations.

12. In Para. 10 d. it is suggested that "[c]onstitutional issues were considered at length in a series of state . . . decisions, including several state hight [sic] court decisions which adopted IOLTA programs." Yes, the schemes were "considered" but for the most part they were considered by the very same entities that had created them. There has been very little independent judicial analysis of the concept. Moreover, I know of no scholarship – independent of the organized bench and bar establishment – that supports the concept.

13. In Para 11 a. there is the following observation:

> "First, the earning on client deposits were generated overtly for the first time, rather than being generated invisibly on the profit and loss statements of banking institutions."

The concept of "overt income generation" and "invisible income generation" has no meaning whatsoever in trust or property law. Moreover, the statement suggests that the bank is the trustee. It is not. It is a debtor, a party to a contract with the attorney-trustee. The issue is not – nor has it ever been – what is going on "on the profit and loss statements of banking institutions." All that has happened with the advent of the NOW account is that the individual client-beneficiary now has a practical choice as to how his attorney-trustee may invest the entrusted



property. Finally, the statement suggests that clients should be penalized for not immediately insisting that their attorneys put their trust funds to productive use. The statement suggests that since the organized bar first thought of how to make client trust money productive, then the organized bar ought to be able to dictate how those trust funds are used. The organized bar appears to be saying: "Because *we* thought of a way to make *your* money productive, *we* get to dictate how *you* use *your* money."

14. In Para. 14 of the Affidavit there is the following sentence:

> The judicial branch, likewise, establishes public policy and compelling state interests through court decisions and orders which affect the administration of justice.

While the judicial branch may have a right to regulate attorneys in the practice of law, it has no right to expropriate and appropriate the equitable or beneficial interest (the "use") of the entrusted property of the non-lawyer citizen who employs an attorney, no matter how "compelling the state interest." Moreover, what constitutes a "compelling state interest" is a question of Federal constitutional law; the state court may not immunize its decrees from Federal constitutional challenge simply by declaring that the interest advanced by the decree is "compelling."

15. In Para. 16 of the Affidavit, there is the assertion that "IOLTA programs evidence a legitimate regulation of the legal profession." False. They evidence an illegitimate

interference in the property rights of citizens who happen to avail themselves of the legal system.

16. In my opinion, objections to the Texas IOLTA program on the basis of the property and associational rights of clients are valid. IOLTA violates the 1st and 5th Amendments of the U.S. Constitution. It is crucial that the concept be deprived of its apparent judicial validation.

/s/ Charles E. Rounds, Jr.
Charles E. Rounds, Jr.

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK DATE: 12-14-94

Sworn to and subscribed before me.

/s/ Stephen A. Hill
Notary Public
My commission expires:
November 23, 2001

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**THE UNITED STATE [sic] DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| WASHINGTON LEGAL FOUNDATION, et al. | : | |
| Plaintiffs | : | Civil Action No. |
| -against- | : | A94 CA 081-JN |
| TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, et al. | : | |
| Defendants | : | |

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**AFFIDAVIT OF ROBERT J. RANDELL**

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**I, ROBERT J. RANDELL,** an attorney and counsellor at law of the State of New York, do hereby affirm as follows:

2. I make this affidavit at plaintiffs' request to aid the Court in its consideration of the nature and operation of IOLTA trust or escrow accounts. My familiarity with the subject is outlined below. I have read and am familiar with the affidavit of Bruce T. Buell, Esq., submitted to the court by the defendants, and I will address some its content as well.

3. I have been closely involved with escrow regulations for attorneys since 1986. In connection with my general real estate work I had established a method of allocating interest among funds in pooled escrow accounts and for providing monthly escrow statements to

clients, as well as a basis for allocating an attorney's escrow administrative fee. It eventually was used commercially by me under a corporate name as an escrow service for attorneys. This led to my becoming fully acquainted with attorneys' general escrow practices and with IOLTA legislation and its impact on the way escrow funds are handled by attorneys. As a result of this I have authored articles for attorneys on escrow management and IOLTA practices. The corporate escrow service is no longer operating. Its function is largely accomplished nowadays by bank sub-accounting, which has become commonplace in New York and elsewhere.

4. I reside at 30 Amherst Road, in Valley Stream, Long Island, New York, and maintain an office for the practice of law at 880 Third Avenue, Manhattan, New York City, New York. I was admitted to practice in New York in April, 1954. I have been admitted *pro hac vice* in the states of Connecticut and New Jersey in real property litigation. I am also admitted to practice before the Southern, Eastern and Northern United States District Courts of New York and before the Supreme Court of the United States.

5. I am a member of the New York County Lawyers' Association, of New York City, where I served on its Real Property Committee for more than six years. I am also a member of the Nassau County Bar Association (the County in which I reside), where I presently serve on the Professional Ethics Committee and on the Community Relations and Public Education Committee.

6. I am a graduate of Brooklyn Law School, in New York City. I clerked while attending law school in the



office of Nathan L. Goldstein, a condemnation and real estate tax certiorari specialist and former Special Assistant U. S. Attorney General for condemnation in the New York metropolitan area. I stayed with the firm for 7 years after admission before entering private practice, still maintaining a specialty in condemnation and real estate tax certiorari. My practice then branched out into general real estate as well as other areas. I have represented such clients as Korean Airlines (negotiation and execution of long term lease for New York City midtown Manhattan headquarters), and the J.C. Penney Company with respect to its department store at Sunrise Mall, in Massapequa, Long Island (in real estate tax certiorari proceedings for 12 years).

Sub-Accounting of Attorney Trust Accounts

7. I must thoroughly disagree with Mr. Buell's statement in paragraph 13 of his affidavit, based on certain unspecified "literature", with respect to bank sub-accounting. He states that sub-accounting has not proven economical because bank costs exceed the small amounts of interest earned on each individual escrow fund. Apparently this is speculation, since it is couched in hypothetical terms. He says that the cost of sub-accounting "would technically" be deducted as a service charge or fee by the depository, and opines that it is only "theoretically possible" to establish such sub-accounts. Mr. Buell is evidently not familiar with current banking practices and services available for trust account administration.

8. It is common knowledge that today, interest net of any fees can be earned on virtually *all* client funds through bank sub-accounting. In most cases it can be earned for the client without any greater administrative cost than required to maintain an IOLTA account. Except perhaps only for the smallest transient deposits, the amount of interest earned will always exceed any added cost of administering the sub-account, because there is virtually no added cost.

9. In fact, bank sub-accounts are inherently *less* expensive to administer than pooled IOLTA accounts, considering that in both cases an attorney has a fiduciary obligation to keep detailed accounting records of the history of each client's separate fund. With bank sub-accounting all the arithmetic is done by the depository. Running balances with accrued interest are maintained for each client's fund and are shown on monthly statements. Year-end IRS 1099's are provided as well, without charge. The attorney will spend less of his own time in general escrow administration using bank sub-accounts than if he maintains a pooled IOLTA account. With an IOLTA account, it is left to the attorney alone to compute what each client has in the account and to make sure the total of the individual client deposits coincides with the IOLTA total.

10. This can be seen from the escrow sub-account 'kit' entitled "Client Funds Account", obtained by the undersigned from Chemical Bank, one of the larger banks in the country. It is attached as Exhibit "A" to this affidavit. Chemical Bank offers unlimited sub-accounting with no minimum balances for each client's escrow, no minimum balance for the attorney's main account, no



service fees whatever, and telephone transfers from the sub-accounts to the main escrow account when disbursement is required. Accrued interest is ultimately reported to the IRS under the client's tax identification number through the 1099 reporting system employed by the bank for depositors.

11. In contrast to the much larger Chemical Bank, a small community based bank on Long Island, The Bank of Great Neck, which has only one banking office, likewise offers unlimited sub-accounting with no minimum client balances, no monthly fees, telephone transfers, a separate IOLTA account for purely transient deposits, and IRS 1099 reports. Its advertisement for these services is shown in a current issue of "Nassau Lawyer", the official publication of the Nassau County Bar Association, at page 14. The advertisement is attached as Exhibit "B" to this affidavit.

12. In still other instances, bank charges for sub-accounting services, though they exist, are minimal. For example, Citibank, NA offers escrow accounts with monthly statements showing each client's sub-account, and furnishes all of the other services mentioned, for individual client escrows of at least $500. NatWest Bank (formerly National Westminster Bank, USA) offers unlimited client sub-accounts, showing the same detail, with no minimum client sub-account balances and all of the services mentioned, all for a flat monthly fee of $10. These are only some examples of interest earning alternatives available to attorneys in the New York City metropolitan area, at no extra cost or at a cost that is bound to be less than the benefit gained for clients.

13. Mr. Buell's statements, therefore, are not only hypothetical and theoretical, but are proven wrong by operation of the market place for bank trust account sub-accounting services.

14. Moreover, it appears that highly sophisticated computer installations are not required for banks to furnish sub-accounting services to attorneys. Sub-accounting systems use the same data-bases already in place for keeping track of bank customers and their accounts. In addition, sub-accounting does not involve the breaking down and allocation of the aggregate interest earned by the total of the escrows listed under the 'umbrella' of the attorney's main trust account. Rather it merely requires that for informational and administrative purposes the separate interest-bearing 'sub-accounts', which are each independently started at the attorney's request using the client's tax identification number, be linked electronically to the attorney's main account. A single composite monthly statement is rendered showing interest credited directly to the individual sub-accounts The interest is thus identified as belonging solely to the client. However, in keeping with the attorney's role as escrowee and fiduciary, control of the funds remains exclusively in the attorney's hands, and they are disbursed solely through the umbrella account.

## The Ethical Basis of IOLTA Trust Accounts

15. The underlying premise of the IOLTA Rule under consideration by the court, described by Mr. Buell in paragraphs 6 and 7 of his affidavit, is that "eligible funds" (in New York these are referred to as "qualified



funds") are those that cannot reasonably earn enough income to benefit the individual clients for whom the funds are held. This is the same premise relied on in ethics opinions rendered throughout the country that IOLTA deposits of such funds by attorneys are proper exercises of fiduciary discretion.

16. In New York, for example, the IOLA ("IOLA" is the acronym used in New York) statute, Judiciary Law 497, refers to such funds when defining deposits that 'qualify' for IOLA accounts. The operative words in the "qualified funds" definition are that such funds would not earn "sufficient interest to justify the expense" of a separate account for the client's benefit [NY Judiciary Law 497, subd.2].

17. The New Jersey IOLTA rule (Rule 1:28A-3(a)(2), New Jersey Rules of General Application) defines the equivalent of "eligible" or "qualified funds" more succinctly. It says they are funds that "would not earn interest in excess of the cost incurred to secure such interest".

18. IOLTA programs first became popular during a period when it was not feasible to allocate interest among escrows in pooled accounts or to establish escrow sub-accounts. Their ethical basis rested on the premise that there is no fiduciary obligation to obtain interest for a client if the cost of doing so exceeds the gain. Thus, the client was said to have no reasonable expectation of obtaining such interest. In some instances this formed a basis for saying the client was never the owner of the interest – even though interest was ultimately realized by the bank depository or by IOLTA by reason of the deposit. Mr. Buell refers to this rationale in paragraph 8

of his affidavit when he states that IOLTA does "not deprive the client of any *rightful* possessory interest the client may have in his funds [emphasis supplied]". The same argument is made in defendants' Memorandum of Authorities, at pages 12-14.

19. In the real world, divorced from such legalisms, experience tells us that it would be startling for a client to learn that he is not the owner of interest which could be earned on the client's money when deposited in an attorney's trust account – no matter what the amount of that interest might be. The client might acknowledge that, as a practical matter, the cost of obtaining the interest would preclude his ever receiving it, but it would be incomprehensible to him why money earned on his own money was not his property.

20. Before bank sub-accounting and office computer systems for allocating interest became cost-effective, whether the client was to be deemed the owner of trust account interest garnered under IOLTA was of no financial significance, since, in the legitimate exercise of the attorney's fiduciary duty, the result was the same. The client did not receive the interest because the attorney was under no ethical or fiduciary duty to obtain it for him. But this assumption underlying IOLTA's operation is no longer valid. It has expired through the passage of time and the progress of technology. Its continued operation as a mandatory program under present day circumstances is inherently confiscatory and oppressive to clients in everyday practice.



The Confiscatory Nature Of Mandatory IOLTA Programs

21. If IOLTA programs had remained voluntary, presumably an attorney who participated could have determined 'eligibility' for IOLTA treatment based on his client's consent. This changed when, in the late 1980's, jurisdiction after jurisdiction imposed mandatory rules governing the exercise of the attorney's discretion and excluded the client from the process altogether.

22. It is no answer to say, as defendants argue in their Memorandum of Authorities, that theoretically an attorney has discretion under the Texas IOLTA rule to make cost-effective interest-bearing trust deposits for the client's benefit. The court will determine whether such discretion is permitted. But even if such discretion exists, this is not the result the rule is designed to achieve, and, more importantly, it is not the way IOLTA operates in practice.

23. It is obvious that mandatory IOLTA regulation of attorneys' fiduciary discretion is designed to enhance IOLTA revenues, not to safeguard client trust account interest. Were this not so, mandatory IOLTA programs would be designed to compel all trust deposits to be made into interest bearing accounts for the *client's* benefit, save only for those deposits that the client consented be made in IOLTA accounts. IOLTA programs operate, without exception, in exactly the opposite way, and without the consent of the client.

24. Whether, in any particular instance, an IOLTA statute or rule is unconstitutionally confiscatory on its face is, of course, a matter for judicial determination. However, there can be no doubt that the restrictions

imposed on attorneys' fiduciary discretion by IOLTA statutes and rules are inherently confiscatory when, for example, in defining "eligible" or "qualified" funds, they require the value of all escrow services performed by the attorney to be used in the cost-effective analysis, or when they prescribe minimum interest guidelines for determining whether a deposit is to be considered "nominal". Application of these formulas has led to abuses that are readily apparent in ordinary practice. I outlined them in an article published in the New York Law Journal on May 16, 1994 (front page), entitled "Avoiding IOLA Abuses", which I append to this affidavit as Exhibit "C" for the court's perusal, rather than repeat its content herein.

25. One of these mechanism [sic] can be seen in paragraph 7 of Mr. Buell's affidavit, where he describes how overhead costs in maintaining an interest bearing account for the client are required to be considered by the attorney when determining whether client deposits are eligible funds. Presumably this includes the costs incurred by the attorney, personally or by staff members, for services which would have to be performed in any event were the escrow deposited in an IOLTA account.

26. Contrary to Mr. Buell's conclusion that the client will lose nothing that is rightfully due him, the IOLTA rule as described by Mr. Buell re-defines the attorney's fiduciary duty and contravenes the ethical basis upon which IOLTA programs are said to rest. The result is inherently confiscatory by restricting an attorney's conduct in acting on behalf of the client's beneficial interest. It also restricts an attorney's professional discretion to spend time and money for the client, without charging



the client, in order to obtain a benefit for the client for whatever reason the attorney chooses.

27. Thus, while giving 'lip-service' to ethical concepts with respect to an attorney's fiduciary duty to the client, IOLTA regulations impose threshold guidelines on attorneys' discretion which almost always insure that significant amounts of interest that could have, and should have been earned for clients will be paid instead to IOLTA. Moreover, despite profound changes in the practical administration of trust funds – changes that necessarily affect the basis of the ethical legitimacy of mandatory IOLTA programs – IOLA and IOLTA advocates continue to insist, as Mr. Buell does in his affidavit, that no untoward appropriation of client interest occurs based on the application of IOLTA guidelines.

28. Nevertheless, for example, the New York IOLA Fund reported that in 1990 and 1991 collections of interest on so-called "nominal" deposits amounted to over $22 million *in each year*. In 1992 and 1993 the collections dropped to $14 million and then to $8 million dollars, respectively, because of lowering interest rates. Based on money market interest rates during those years, the amount of "nominal" funds constantly on deposit in IOLTA (IOLA) accounts in New York can be estimated to have ranged between $340 and $466 million.

I declare under penalty of perjury that the foregoing is true and correct.

Executed by me this 16th day of December, 1994.

/s/ Robert J. Randell
Robert J. Randell

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 27, 1997

Mr. H. Robert Powell
Hughes & Luce
111 Congress, Suite 900
Austin, TX 78701

Re: Thomas R. Phillips, et al.
v. Washington Legal Foundation, et al.
No. 96-1578

Dear Mr. Powell:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted, limited to Question 1 presented by the petition.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

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**ORDER LIST**

**FRIDAY, JUNE 27, 1997**

**CERTIORARI GRANTED**

96-1578 PHILLIPS, THOMAS, ET AL V. WASHINGTON LEGAL FDN

The order granting the petition for a writ of certiorari is amended to read as follows:

The petition for a writ of certiorari is granted limited to the following question: Is interest earned on client trust funds held by lawyers in IOLTA accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer?

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# RULES GOVERNING THE OPERATION OF THE TEXAS EQUAL ACCESS TO JUSTICE PROGRAM

Including Amendments Received Through February 1, 1997

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*Research Note*

*Use* WESTLAW® *to find cases citing a rule.* WESTLAW *may also be used to search for specific terms or to update a rule; see the TX-RULES and TX-ORDERS Scope Screens for further information.*

*Amendments to these rules are published, as received, in* South Western Reporter 2d *and* Texas Cases *advance sheets.*

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*Table of Rules*

**Rule**

25. Review and Appeal.

26. Return to Former Status.

27. Confidentiality.

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## RULE 1. ESTABLISHMENT OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION

The Texas Equal Access to Justice Program (the "Program"), Article XI of the State Bar Rules adopted and promulgated by the Supreme Court of Texas by Order dated April 30, 1984, shall be administered by the Texas Equal Access to Justice Foundation (the "Foundation"), a Texas Non-Profit Corporation.

## RULE 2. ARTICLES OF INCORPORATION AND BYLAWS

The Articles of Incorporation and Bylaws of the Foundation shall be as set forth in Attachments 1 and 2, respectively, hereto.*

## RULE 3. DIRECTORS OF THE FOUNDATION

Directors of the Foundation shall be appointed and their terms of office fixed as set forth in Attachment 2. The initial directors of the Foundation are named in Attachment 1.

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* Pub. Note: Copies of the Articles of Incorporation and Bylaws of the Texas Equal Access to Justice Foundation are available from the State Bar.



## RULE 4. DEPOSIT OF CERTAIN CLIENT FUNDS

An attorney licensed by the Supreme Court of Texas, receiving in the course of the practice of law in this state client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time, must establish and maintain a separate interest-bearing insured depository account at a financial institution and deposit in the account such funds. All client funds may be deposited in a single unsegregated account. Attorneys who practice in a law firm or for a professional corporation may utilize the interest-bearing trust account of such firm or corporation to comply with this Rule 4. The interest earned on the account shall be paid in accordance with and used for the purposes set forth in these Rules. The Foundation shall hold the entire beneficial interest in the interest earned. Funds to be deposited under these Rules shall not include those funds evidenced by a financial institution instrument, such as a draft, until the instrument is fully credited to the financial institution in which the account is maintained. The term "draft" as herein used is defined in Section 3.104(b)(1) of the Texas Business and Commerce Code. A draft or similar instrument need not be treated as a collected item unless it is the type of instrument which the financial institution generally treats as a collected item.

(Amended Dec. 13, 1988, eff. July 1, 1989; May 22, 1991, eff. Jan. 1, 1992.)

## RULE 4A. ATTORNEYS WHO DO NOT HANDLE CLIENT TRUST FUNDS

Licensed attorneys who do not handle client trust funds are not required to establish an IOLTA account.

Such attorneys must nevertheless advise the Foundation during the annual IOLTA compliance process that they do not handle client trust funds.

(Adopted May 22, 1991, eff. Jan. 1, 1992.)

## RULE 4B. ACCOUNTS UNABLE TO GENERATE NET INTEREST

Licensed attorneys who maintain client trust funds that are nominal in amount or are reasonably anticipated to be held for a short period of time must attempt in good faith to locate an interest bearing account that would generate interest greater than service charges. If such an account cannot be located, the attorney must notify the Foundation during the annual IOLTA compliance process. Such attorney is required to maintain a non-interest bearing client trust account for such funds.

(Adopted May 22, 1991, eff. Jan. 1, 1992.)

## RULE 5. ANNUAL NOTICE TO FOUNDATION

Licensed attorneys must advise the Foundation in writing annually as to their IOLTA status as provided in Rule 24.

(Amended Dec. 13, 1988, eff. July 1, 1989; May 22, 1991, eff. Jan. 1, 1992.)



## RULE 5A. NOTICE TO FOUNDATION OF CHANGE IN STATUS

Licensed attorneys must notify the Foundation in writing within thirty (30) days of any change in IOLTA status.

(Adopted Dec. 13, 1988, eff. July 1, 1989; amended May 22, 1991, eff. Jan. 1, 1992.)

## RULE 5B. NOTICE TO FOUNDATION OF CLOSED ACCOUNT

An attorney, law firm, or professional corporation engaged in the practice of law and maintaining accounts provided for in these Rules must notify the Foundation in writing within thirty (30) days of the closing of such account(s).

(Adopted Dec. 13, 1988, eff. July 1, 1989.)

## RULE 5C. NOTICE TO FOUNDATION OF CHANGE IN ELIGIBILITY STATUS [DELETED]

(Deleted May 1, 1991, eff. Jan. 1, 1992.)

## RULE 6. FUNDS ELIGIBLE FOR THE PROGRAM

The funds of a particular client are nominal in amount or held for a short period of time, and thus eligible for use in the Program, if such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of

establishing and maintaining the account, service changes, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client. Also to be considered are the nature of the proceeding or transaction involved and the likelihood of delay in the need for such funds in such proceeding or transaction. The attorney, law firm or professional corporation should exercise good faith judgment in determining initially whether client funds should be included in the Program and should review at reasonable intervals whether changed circumstances require further action with respect to such funds.

## RULE 7. ACCOUNTS TO BE MAINTAINED AT FINANCIAL INSTITUTIONS

An account established pursuant to Rule 4 shall be a trust account from which withdrawals or transfers may be made on demand (subject only to any notice period which the financial institution is required to reserve by law or regulation) established in any bank, credit union or savings and loan association, selected in the exercise of ordinary prudence, which is authorized by federal or state law to do business as a banking entity in Texas and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Texas Share Guaranty Credit Union or which is a "State Depository" as provided by Article 2529 of the Revised Civil Statutes of Texas.

(Amended May 22, 1991, eff. Jan. 1, 1992.)



## RULE 8. INTEREST RATES

An attorney, law firm or professional corporation establishing an account under these Rules shall attempt in good faith to obtain a rate of interest payable on the account not less than the rate paid by the depository institution to other depositors with accounts of similar size. A higher rate offered by the institution on deposits meeting certain time requirements or minimum amounts, such as those offered in the form of certificate of deposit, may be obtained if there is no impairment of the right to withdraw or transfer principal immediately, other than the statutory notification requirements generally applicable to those accounts, even though interest may be lost because of the withdrawal or transfer.

## RULE 9. DIRECTIONS TO DEPOSITORIES

The depository institution shall be directed by the attorney, law firm or professional corporation establishing the account:

(a) to remit, at least quarterly, interest earned on the average daily balance in the account, less reasonable service charges, to the Foundation;

(b) to transmit to the Foundation with each remittance a statement showing the name of the attorney, law firm or professional corporation with respect to which the remittance is sent, the rate or rates of interest applied, and the amount of service charges deducted, if any; and

(c) to transmit to the depositing attorney, law firm or professional corporation at the same time a report is sent to the Foundation, a report showing the amount paid

to the Foundation for that period, the rate or rates of interest applied, the amount of service charges deducted, if any, and the average daily account balance for each month of the period for which the report is made.

## RULE 10. ORGANIZATIONS ELIGIBLE FOR GRANTS

The Foundation shall make grants to organizations, not individuals. Prior to making its first grant of funds, the Board of Directors of the Foundation shall promulgate a policy, consistent with these Rules, which shall state the criteria to be met by an organization to qualify for a grant. Such criteria shall provide, among other criteria to be specified by the Board of Directors, that the organization must be exempt from taxation under section 501(c)(3) of the United States Internal Revenue Code, as amended, or corresponding provisions of any subsequent United States Internal Revenue law or laws, have as a primary purpose the delivery of legal services to low income persons pursuant to income and type of case criteria acceptable to the Board of Directors, be current in all filings required to be made by it with any governmental authority, maintain open records and conduct open meetings (subject to reasonable limitations for an organization of its type), be an equal employment opportunity employer, and be able to demonstrate that it can utilize any funds granted to it in a manner consistent with these Rules and policies adopted by the Board of Directors of the Foundation. Nothing herein shall be deemed to impair any attorney-client relationship.



## RULE 11. PERSONS ELIGIBLE TO BENEFIT FROM GRANTS

Organizations receiving grants of funds from the Foundation shall use such funds to provide legal services to individual indigent persons. Prior to the making of its first grant, and at least annually thereafter, the Board of Directors of the Foundation shall adopt criteria relating to income, assets and liabilities defining the indigent persons eligible to benefit from Foundation grants.

## RULE 12. CRITERIA FOR GRANTS

Prior to making its first grant of funds, the Board of Directors of the Foundation shall promulgate a policy, consistent with these Rules, which shall state the criteria to be made for a grant from the Foundation. Such criteria shall provide, among other criteria to be specified by the Board of Directors, that the funds granted by the Foundation may not be used to duplicate a service already funded by another entity or in place of other funds available for the same purpose.

(Amended May 22, 1991, eff. Jan. 1, 1992.)

## RULE 13. USE OF FUNDS LIMITED TO CASES WHICH CANNOT GENERATE FEES

Funds granted by the Foundation to organizations to provide legal services to the indigent in civil matters may not be used for any case or matter that, if undertaken on behalf of an indigent person by an attorney in private

practice, might reasonably be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party.

## RULE 14. EXCEPTION TO RULE 13

The provisions of Rule 13 shall not be applicable in any case where the organization receiving funds granted by the Foundation determines in good faith that the indigent person seeking legal assistance has made reasonable efforts to obtain the services of an attorney in private practice for the particular matter (including contacting attorneys in private practice in the county of residence of the indigent person who normally accept cases of a similar nature), and has been unable to obtain such services because the potential fee is inadequate, is likely to be uncollectible, would substantially consume any recovery by the client, or because of any other reason which the organization, acting in good faith, believes prevents the client from obtaining the services of a private attorney.

## RULE 15. FUNDING OF CERTAIN SUITS AND ACTIVITIES NOT PERMITTED

No funds shall be granted by the Foundation to directly fund class action suits, lawsuits against governmental entities, or lobbying for or against any candidate or issue. Provided, however, that funds may be granted to finance suits against governmental entities on behalf of individuals in order to secure entitlement to benefits such as, but not limited to, social security, aid to families with dependent children, food stamps, special education for



the handicapped, Medicare, Medicaid, subsidized or public housing, or other economic, shelter or medical benefits provided directly to indigent individuals.

## RULE 16. RECORDS AND REPORTS OF GRANTEES

The Foundation shall require, as a condition to the granting of funds to any organization or program, that adequate provision be made for reports to the Foundation as to the actual use of the funds so granted and for audit of such reports. Each such organization or program receiving funds from the Foundation shall keep its financial records in accordance with generally accepted accounting principles for organizations of its type and shall furnish reports to the Foundation in such form and containing such information as shall be reasonably requested pursuant to policies adopted by the Board of Directors of the Foundation.

## RULE 17. CESSATION OF FUNDING

The Foundation may cease funding an organization which fails to act in accordance with the requirements of the Order of the Supreme Court of Texas creating the Program, these Rules or the policies adopted by the Board of Directors of the Foundation as provided in these Rules. The Board of Directors of the Foundation shall adopt appropriate procedures to be followed when it has been determined to cease funding an organization, including reasonable notice to the organization involved, an opportunity to correct any deficiency (if reasonably possible to do so) and a hearing before the Board of Directors.

## RULE 18. ADMINISTRATIVE COSTS OF FOUNDATION

The Foundation may expend funds for administrative costs of the Program, including any costs incurred after April 30, 1984, and may provide a reasonable reserve for administrative costs.

## RULE 19. RECORDS OF THE FOUNDATION

The records of the Foundation, including applications for funds, whether or not granted, shall be open for public inspection at reasonable times and subject to reasonable restrictions dictated by the operational needs of the Foundation. The Foundation shall maintain its books of account in accordance with generally accepted accounting principles for organizations of its type and shall maintain written minutes of meetings of its Board of Directors and committees. It shall also maintain such other records as are within reasonable policies established by its Board of Directors.

## RULE 20. INITIAL DISTRIBUTION OF FUNDS BY THE FOUNDATION

The initial distribution of funds under the Program shall be made at a time when, in the determination of the Board of Directors of the Foundation, there are sufficient funds to provide an adequate distribution.

## RULE 21. OTHER INTEREST-BEARING ACCOUNTS

Participating in the Program does not prohibit an attorney, law firm or professional corporation engaged in



the practice of law from establishing one or more interest-bearing accounts or other investments permitted by the Texas Code of Professional Responsibility (Article X, Section 9, State Bar Rules) with the interest or dividends earned on the accounts or investments payable as directed by clients for whom funds are not deposited in accordance with these Rules.

## RULE 22. COMPLIANCE WITH CODE OF PROFESSIONAL RESPONSIBILITY

Neither the Foundation nor any organization or program to which it grants funds may take an action or require an attorney to take an action in violation of the Code of Professional Responsibility (Article X, Section 9, State Bar Rules) or in violation of any other code of professional responsibility adopted by this state for attorneys.

## RULE 23. ATTORNEY LIABILITY

Nothing in these Rules affects the obligations of attorneys, law firms or professional corporations engaged in the practice of law with respect to client funds other than client funds reasonably determined to be "nominal in amount" or reasonably anticipated to be held for a "short period of time," as those terms are defined by these Rules. An attorney, law firm or professional corporation is not liable in determining which funds are nominal in amount or on deposit for a short period of time if the determination is made in good faith in accordance with these Rules.

## RULE 24. COMPLIANCE

(a) On or after June 1 of each year, all attorneys licensed by the Supreme Court of Texas shall report IOLTA compliance in a manner to be prescribed by the Texas Equal Access to Justice Foundation and the State Bar of Texas. Such compliance statements may require such information as is deemed reasonably necessary by the Foundation and the State Bar of Texas and shall be signed by the reporting attorney.

(b) Each attorney must complete an annual compliance statement and return it to the Foundation by the date stated on the compliance statement. If the compliance statement is timely filed, indicating compliance, there will be no acknowledgement. The presumption of compliance after timely filing shall obtain, absent some evidence to the contrary.

(c) Should a compliance statement filed by an attorney fail to evidence compliance, the Foundation shall contact the attorney and attempt to resolve administratively the non-compliance.

(d) The Foundation shall furnish annually to the State Bar of Texas a list of all attorneys licensed by The Supreme Court of Texas (i) who have not timely filed a compliance statement or (ii) as to whom the Foundation has been unable administratively to resolve any impediment to the proper filing of a compliance statement. The State Bar of Texas shall send to each person so reported, by certified mail, return receipt requested, a non-compliance notice. Should the attorney fail or refuse to file the compliance statement within thirty (30) days of such notice, the State Bar of Texas shall so notify the Clerk of



The Supreme Court of Texas, and the attorney shall be immediately suspended as an attorney licensed to practice law in the State of Texas until a compliance statement is filed.

(Adopted Dec. 13, 1988, eff. July 1, 1989; amended May 22, 1991, eff. Jan. 1, 1992.)

## RULE 25. REVIEW AND APPEAL

(a) An attorney may file a written request based upon good cause for exemption from compliance with any of the requirements of these Rules, an extension of time for compliance, an extension of time to comply with a deficiency notice, or an extension of time to file an annual compliance statement. Such request shall be reviewed and determined by a Committee established by the State Bar or by such committee as the chairperson may, from time to time, designate. The attorney shall be promptly notified of the decision by the Committee.

(b) "Good cause" shall exist when an attorney is unable to comply with this Article because of extraordinary hardship or extenuating circumstances which were not willful on the part of the attorney and were beyond his or her control.

(c) Should the decision of the Committee be adverse to the attorney, the attorney may request the Board of Directors of the State Bar to review the decision by making such request in writing to the Executive Director of the State Bar within thirty days of notification of the decision of the Committee. The Chairman of the Board may appoint a committee of the Board to review the

decision of the Committee and make a recommendation to the Board. The decision shall be made by the Board.

(d) Should the decision of the Board be adverse to the attorney, the attorney may appeal such decision by filing suit within thirty days of notification of the Board's action, failing which the decision of the Board shall be final. Such suit shall be brought against the State Bar, and shall be filed in a district court in Travis County, Texas. Trial shall be de novo, but the burden of proof shall be on the attorney appealing, the burden shall be by a preponderance of the evidence, and the attorney shall prove the existence of "good cause" as defined herein. The trial court shall proceed to hear and determine the issue without a jury. Either party shall have a right to appeal.

(e) Any suspension of an attorney shall be vacated during the administrative review process and while any suit filed is pending.

(Adopted Dec. 13, 1988, eff. July 1, 1989; amended May 22, 1991, eff. Jan. 1, 1992.)

### RULE 26. RETURN TO FORMER STATUS

Any attorney whose license to practice law has been suspended under the terms of these Rules who after the date of suspension files a report with the Foundation showing compliance shall be entitled to have such suspension promptly terminated and be returned to former status. Return to former status shall be retroactive to the inception of suspension, but shall not affect any proceeding for discipline of the member for professional misconduct. The State Bar shall promptly notify the Clerk that



an attorney formerly suspended under these Rules has now complied with these Rules.

(Adopted Dec. 13, 1988, eff. July 1, 1989; amended May 22, 1991, eff. Jan. 1, 1992.)

### RULE 27. CONFIDENTIALITY

The files, records, proceedings, as they relate to the compliance or noncompliance of any attorney with the requirements of these Rules, shall be confidential and shall not be disclosed except upon consent of the attorney affected or as directed in the course of judicial proceeding by a court of competent jurisdiction.

(Adopted Dec. 13, 1988, eff. July 1, 1989; amended May 22, 1991, eff. Jan. 1, 1992.)